86-216

No.

Supreme Court, U.S.
FILED
AUG 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMITTEE OF REPRESENTATIVES OF
DALKON SHIELD CLAIMANTS,
Petitioner,

v.

A.H. ROBINS COMPANY, INCORPORATED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MARK C. ELLENBERG
Counsel of Record
SHELDON L. PINE
JOEL KAUFMAN
CADWALADER, WICKERSHAM
& TAFT
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 862-2200
Counsel for Petitioner
Committee of Representatives
of Dalkon Shield Claimants

August 12, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

28 U.S.C. § 157(b)(5) (Supp. II 1984) provides that the district court where a bankruptcy case is pending shall decide whether personal injury and wrongful death *claims* shall be tried by it or by the district court in the district where the claim arose.

The question presented is:

1. Whether 28 U.S.C. § 157(b)(5)—which is part of an integrated statutory scheme to insure personal injury claimants against a debtor under the Bankruptcy Code a right to a district court jury trial of their claims—authorizes the district court where the bankruptcy case is pending to transfer to itself for trial thousands of pending *cases* which had been filed against the debtor in various federal and state courts prior to the debtor's bankruptcy.

THE PARTIES

Petitioner, the Committee of Representatives of Dalkon Shield Claimants, is an official committee appointed by the United States Trustee pursuant to 11 U.S.C. § 151102(b) to represent the interests of the holders of claims against A.H. Robins arising from the sale or use of the Dalkon Shield. Respondent is A.H. Robins Company, Incorporated, a corporation organized under the laws of Virginia. Other parties to the proceeding in the United States Court of Appeals for the Fourth Circuit were Anna Piccinin, Kathryn Conrad, and Luisa and Jack Mosa. All four individuals had prepetition actions pending against A.H. Robins based on the sale and use of the Dalkon Shield. The Aetna Casualty and Surety Company, a corporation organized under the laws of Connecticut, also intervened below.

TABLE OF CONTENTS

	Page(s)
QUESTION PRESENTED	i
THE PARTIES	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR ALLOWANCE OF THE WRIT	5
THE DECISION BELOW—WHICH MISCONSTRUES 28 U.S.C. § 157(b)(5), THEREBY DEPRIVING CLAIMANTS OF THEIR RIGHTS TO A JURY TRIAL AND IMPAIRING THE JUST ADMINISTRATION OF THE BANKRUPTCY CASE—RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	5
Introduction	5
Section 157(b)(5) Does Not Centralize Cases, But Decentralizes Claims	6
The Harm to Claimants' Jury Trial Rights and to the Administration of the Bankruptcy Reorganization Process	12
CONCLUSION	14

TABLE OF AUTHORITIES

Page(s)

Armster v. United States District Court for the Central District of California, 792 F.2d 1423 (9th Cir. 1986) 12
Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 12
Environmental Defense Fund v. EPA, 598 F.2d 62 (D.C. Cir. 1978) 13
Hobson v. Brennan, Case No. 76-1326, slip op. (D.D.C. June 24, 1986) 12
In re "Agent Orange" Product Liability Litigation, 565 F. Supp. 1263 (E.D.N.Y. 1983) 13
In re "Bendectin" Products Liability Litigation, 102 F.R.D. 239 (S.D. Ohio 1984) 13
In re Delorean Motor Co., 49 B.R. 900 (Bankr. E.D. Mich. 1985) 6
In re Johns-Manville Corp., 31 B.R. 627 (S.D.N.Y. 1983) 11
In re Johns-Manville Corp., 36 B.R. 727 (Bankr. S.D.N.Y. 1984) 13
In re Johns-Manville Corp., 45 B.R. 823 (S.D.N.Y. 1984) 11
In re O'Bannon, 49 B.R. 763 (Bankr. M.D. La. 1985) 6
In re UNR Industries, Inc., 45 B.R. 322 (N.D. Ill. 1984) 11
In re White Motor Credit, 761 F.2d 270 (6th Cir. 1985) 8, 9, 10
Michigan Chemical Corp. v. Travelers Indemnity Co., 530 F. Supp. 147 (W.D. Mich. 1982), *rev'd*, 728 F.2d 374 (6th Cir. 1984) 13
United States v. Vertac Chemical Corp., 489 F. Supp. 870 (E.D. Ark. 1980) 13

Statutes and Rules

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 ..... *passim*
Bankruptcy Rule 3002(a) 6
Bankruptcy Rule 3003 6
Bankruptcy Rule 3007 6

TABLE OF AUTHORITIES—Continued

	Page(s)
11 U.S.C. § 362(a)(1)	6
11 U.S.C. § 501	6
11 U.S.C. § 502(c)	11
11 U.S.C. § 151102(b)	4
28 U.S.C. § 157(b)(5)	*passim*
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1334(b)	4
28 U.S.C. § 1334(c)(1)	6, 8
28 U.S.C. § 1411(a)	2, 6, 7
28 U.S.C. § 1412	10

Congressional Material

130 Cong. Rec. S8890 (daily ed. June 29, 1984)	10

Miscellaneous

Interview, *3 ABI Newsletter* No. 3 (Winter 1984/1985)	7
Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 Harv. L. Rev. 1121 (1983)	13
Note, *Relief From Tort Liability Through Reorganization*, 131 U. Pa. L. Rev. 1227 (1983)	13
M. Roe, *Bankruptcy and Mass Tort*, 84 Colum. L. Rev. 846 (1984)	13
D. Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of The Tort System*, 97 Harv. L. Rev. 849 (1984)	13
W. Taggart, *The New Bankruptcy Court System*, 59 Am. Bankr. L. J. 231 (1985)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. ——

COMMITTEE OF REPRESENTATIVES OF
DALKON SHIELD CLAIMANTS,
Petitioner,

v.

A.H. ROBINS COMPANY, INCORPORATED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, the Committee of Representatives of Dalkon Shield Claimants, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on April 10, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 788 F.2d 994, and is reprinted in the appendix hereto, p. 1a, *infra.*

The order of the United States District Court for the Eastern District of Virginia was not reported. The Court ruled from the bench and did not issue an opinion. The Court's order and bench ruling are reprinted in the appendix hereto, p. 47a, *infra.*

JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Fourth Circuit on April 10, 1986. See p. 1a, *infra*. Rehearing was denied on May 14, 1986. See p. 53a, *infra*.

The jurisdiction of this Court is invoked under section 1254(1) of Title 28, United States Code.

STATUTES INVOLVED

28 U.S.C. § 157(b)(5) Procedures

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. § 1334(c)(1) Bankruptcy Cases and Proceedings

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1411(a) Jury Trials

> (a) Except as provided in subsection (b) of this section, this Chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.

STATEMENT OF THE CASE

A.H. Robins Company, Incorporated ("Robins"), is a large manufacturer of consumer and pharmaceutical products. On August 21, 1985, Robins invoked federal bankruptcy jurisdiction and filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Virginia. Robins filed the petition in response to products liability and related litigation arising from the manufacture and marketing of the Dalkon Shield intrauterine contraceptive device. The Dalkon Shield has allegedly killed a number of its users and caused injuries including pelvic inflammatory disease, infertility, loss of the uterus, ovaries, and fallopian tubes, miscarriage, and birth defects in children conceived while the device was being used by the mother. The district court, at Robins' request, withdrew the general reference of the case to the bankruptcy court. Except for referrals of discrete matters to the bankruptcy court, the district court has been sitting in this case as a trial court.

On the day the bankruptcy petition was filed, over 5,000 Dalkon Shield actions were pending against Robins in various state and federal courts throughout the country. Many of these cases included defendants other than Robins. These codefendants included local doctors alleged to have committed malpractice, Dr. Hugh Davis, the developer of the Dalkon Shield, and Aetna Casualty and Surety Company, which insured Robins and which allegedly acquired independent tort liability by participating in decisions to conceal data concerning defects in the Dalkon Shield. A large number of the pending cases had completed or nearly completed discovery and were scheduled for trial. All the cases automatically were stayed by the

filing of the bankruptcy petition and have remained frozen ever since.

Over 300,000 individuals have now filed Dalkon Shield-related proofs of claim in the bankruptcy case.[1] The claimant pool presumably includes most, if not all, of the approximately 5,000 persons who had cases pending when the petition was filed. The claimants reside in all 50 states and over 70 foreign countries.

On October 30, 1985, Robins filed a Motion for (1) Determination of Trial Venue, (2) Identification of Cases "Related To" This Chapter 11 Case and (3) Transfer of Cases (the "Motion"). By its Motion, Robins sought to transfer all of the pending prepetition Dalkon Shield cases to the Eastern District of Virginia. Robins did not provide notice of its Motion or of the hearing thereon to the parties in the pending civil actions. It did, however, serve notice upon counsel for the Committee of Representatives of Dalkon Shield Claimants (the "Committee").[2]

At the hearing on the Motion before the district court, Robins presented no evidence concerning the individual cases transferred. After hearing argument from counsel, the court immediately entered an order which provided, *inter alia*, that

> 1. pursuant to Sections 157(b)(5) and 1334(b) of Title 28, United States Code, to the extent Dalkon Shield personal injury claims are to be tried, they shall be tried in the District Court for the Eastern District of Virginia;

---

[1] The deadline for filing claims was April 30, 1986.

[2] The Committee was appointed by the United States Trustee, pursuant to 11 U.S.C. § 151102(b), on September 24, 1985. The Committee represents the general interests of the holders of claims arising from the sale or use of the Dalkon Shield.

2. all such actions, now pending in any federal district court or subsequently removed thereto, shall be transferred to the Eastern District of Virginia; and

3. the district court would retain its powers to abstain from hearing or to remand to state courts any particular case.

On appeal, the United States Court of Appeals for the Fourth Circuit upheld the *en masse* transfer. The Court reasoned that centralization of all Dalkon Shield claims and cases in a single forum—the district court sitting in bankruptcy—was necessary to a fair estimation of the value of all the claims and to the development of a plan of reorganization based on that estimation. *See* appendix hereto, p. 41a, *infra*. 788 F.2d at 1013-14. The Court of Appeals modified the District Court's order, however, by requiring notice advising each claimant of his or her rights to object to trial in Richmond, to move for abstention, and to seek a hearing. *See* appendix hereto, pp. 44a-45a, *infra*. (App. 44a-45a). 788 F.2d at 1015-16.

REASONS FOR ALLOWANCE OF THE WRIT

THE DECISION BELOW—WHICH MISCONSTRUES 28 U.S.C. § 157(b)(5), THEREBY DEPRIVING CLAIMANTS OF THEIR RIGHTS TO A JURY TRIAL AND IMPAIRING THE JUST ADMINISTRATION OF THE BANKRUPTCY CASE—RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Introduction

In the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("the 1984 Amendments"),[3] Congress—in response to the Johns-Manville Corporation's utilization of bankruptcy to restructure its asbestos-related tort

[3] Pub. L. No. 98-353, 98 Stat. 333.

liabilities—enacted a comprehensive scheme to guarantee personal injury tort claimants in bankruptcy cases a right to a trial by jury in a district court. The decision below misconstrues the linchpin of that statutory scheme —28 U.S.C. § 157(b)(5)—in a fundamental way. The Court construed Section 157(b)(5) to centralize the trial of all claims in one district court. Quite to the contrary, Congress intended the statute to facilitate the transfer of claims out of the district where the bankruptcy was filed to courts more convenient to the claimants. If allowed to stand, the decision below would eviscerate the integrated scheme for trial by jury created by Congress in the 1984 Amendments.

Section 157(b)(5) Does Not Centralize Cases, But Decentralizes Claims

When a bankruptcy petition is filed, all legal proceedings against the debtor are automatically stayed, and the commencement of new proceedings outside the bankruptcy court is prohibited. 11 U.S.C. § 362. A creditor pursues his or her rights against the debtor by filing—in the bankruptcy court—a proof of claim. 11 U.S.C. § 501; Bankruptcy Rules 3002(a), 3003. If the debtor files an objection to a claim, the claim is tried. Bankruptcy Rule 3007. Ordinarily, the claim is tried by the bankruptcy court without a jury.

In the 1984 Amendments, Congress created a special exception to the general rules concerning disposition of bankruptcy claims for claims based on personal injuries. Section 102(a), 28 U.S.C. § 1411(a) (Supp. II 1984), preserves for individuals with personal injury claims against a debtor under the Code the right to trial by jury. *See In re Delorean Motor Co.*, 49 B.R. 900, 912 (Bankr. E.D. Mich. 1985); *In re O'Bannon*, 49 B.R. 763, 768 (Bankr. M.D. La. 1985). Section 104(a), 28 U.S.C. § 157(b)(5), complements section 1411 by providing

(1) that the trial of personal injury claims shall be in an Article III district court and (2) that the district court in which the bankruptcy case is pending may determine to have some or all of the personal injury claims tried in other district courts. W. Taggart, *The New Bankruptcy Court System*, 59 Am. Bankr. L.J. 231, 251, 253 (1985).[4] Finally, Section 101, 28 U.S.C. § 1334(c)(1), authorizes district courts to abstain from asserting jurisdiction over any case involving state law. Thus, in addition to the option of sending personal injury claims to another district, the district court in which a bankruptcy case is pending may determine to let the claims be decided by way of trial in state courts.

Read in concert with the provisions it complements, Section 157(b)(5) manifestly is designed to decentralize the adjudication of personal injury claims. First, decentralization mitigates the special hardships which often result when personal injury claimants, as opposed to ordinary trade creditors, are forced to pursue claims in a distant forum. There could be no better example of the need for sensitivity to hardships on claimants than the Robins case, where, as a consequence of Robins' worldwide Dalkon Shield marketing program, claimants are scattered around the globe. These victims, who acquired Dalkon Shields from local doctors and clinics, had no direct contact with Robins or Virginia and, most likely, had no idea where or by whom the Dalkon Shield was manufactured.

---

[4] Indeed, Senate Majority Leader Dole—a leading sponsor of bankruptcy reform and a principal Senate conferee on the 1984 Amendments—stated that section 157(b)(5) was intended to be inserted at the end of the new section 1411(a). "The jury trial provisions of 1411(a) should be read in tandem with the text of 157(b)(5). The result is the possibility of a jury trial in personal injury and wrongful death cases, in the district court where such jury trial is available under applicable nonbankruptcy law." Interview, 3 *ABI Newsletter* No. 3, 1, 3 (Winter 1984/1985).

Second, decentralization enables claimants to receive timely jury determinations of their claims. As the example of Johns-Manville made clear, and as the 300,000 claims pending in Robins confirm, the number of personal injury claims against a single debtor could easily be so large that no single district court could provide a timely jury trial to each claimant. Thus, Congress understood that if a right to jury trial were to be guaranteed to personal injury claimants, trials in courts other than that in which the bankruptcy was filed had to be permitted. Section 157(b)(5) was enacted expressly to allow decentralized trials.

Finally, trials in other federal or state courts could be much more efficient. This is especially so where there are related claims against codefendants, where a prepetition case has proceeded nearly to completion, and where, as in most personal injury cases, state law issues predominate. Section 1334(c)(1), which permits abstention, and Section 157(b)(5) allow these efficiencies to be captured.

In *In re White Motor Credit*, 761 F.2d 270 (6th Cir. 1985), the United States Court of Appeals for the Sixth Circuit clearly articulated the rationale for the integrated scheme of the 1984 Amendments. In the course of exploring how to treat a large number of personal injury claims against a Chapter 11 debtor, the Court stated,

> Since there are other defendants in many of the tort cases against White Motor—defendants who cannot be transferred out of the jurisdiction they are now in—the cases will have to be tried twice in different courts if the district court decides to liquidate the individual cases. This is a strong reason for leaving the cases where they are. In addition, plaintiffs and defendants might be faced with inconsistent rulings and verdicts and multiple res judicata problems. Moreover, *United Mine Workers v. Gibbs*, 383 U.S.

> 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), a pendent jurisdiction case which discusses somewhat similar issues concerning the exercise of federal jurisdiction, emphasizes that federal courts should be hesitant to exercise jurisdiction when "state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought." 383 U.S. at 726, 86 S.Ct. at 1139. In these products liability cases, state issues clearly predominate.
>
> Finally, in large bankruptcy cases with hundreds or even thousands of tort litigants beating on the door of one federal judge, judicial health and survival, or at least judicial economy and expeditiousness, may depend on the court's authority to refer cases to other courts. Since the 1984 Bankruptcy Act prevents reference of these tort cases to bankruptcy courts, as in the past, it makes good sense to give the district courts wide latitude in referring the cases through abstention to other courts.

761 F.2d at 273-74.

In short, when that point in a bankruptcy case arrives at which personal injury claims, not otherwise disposed of by the reorganization plan, must be tried to juries, the district court in which the bankruptcy is filed has three options. First, the court can transfer all or some of the claims to the district courts in the districts in which the claims arose. Second, where a claim filed in the bankruptcy case embodies the same cause of action contained in a suit commenced in a federal district court prior to bankruptcy, the court can modify the automatic stay to let that case proceed. Third, where a claim filed in the bankruptcy case embodies the same cause of action contained in a suit commenced in state court prior to the bankruptcy, the court can abstain and modify the automatic stay to let that case proceed. The operation of the 1984 Amendments was succinctly summarized by Senator Dole, as follows:

> The result of the Conference discussion was a provision that preserved the integrity of bankruptcy jurisdiction while allowing abstention for personal injury cases where they can be timely adjudicated in State courts. In addition, where abstention does not occur, those cases will be handled by the district court where bankruptcy has been filed or, if that court finds it appropriate, where the claim arose.

130 Cong. Rec. S8890 (daily ed. June 29, 1984).

Senator Dole's comments were echoed by the court in *White Motor*. The Court stated,

> [I]n liquidating tort cases in bankruptcy, the district court would first decide whether it should leave the cases with respect to which claims have been filed in the bankruptcy court in the courts in which they are pending and then, if it decides against this course, the district court must try the cases itself or send them to the federal court for the district in which they arose.

761 F.2d at 273.

The decision below misused section 157(b)(5) in several ways. First, the section was used as a vehicle for centralizing litigation in the district court where the bankruptcy was pending, instead of for spreading the litigation burden to other courts, as Congress intended. Second, the section was used for the transfer of prepetition cases, when—on its face—it applies only to bankruptcy "claims." 11 U.S.C. § 157(b)(5). There is nothing in the language, legislative history, or purpose of section 157(b)(5) which even remotely suggests that it authorizes the transfer of prepetition cases frozen by the automatic stay. Indeed, the Bankruptcy Code contains a separate provision governing the transfer of cases. 28 U.S.C. § 1412.

Finally, the decision below invoked section 157(b)(5) prematurely. In the context of a Chapter 11 reorganiza-

tion, the home district court cannot make a reasoned venue determination until a plan of reorganization is proposed. Only then can the court have any understanding of the number and types of personal injury claims requiring resolution by trial. And only then can the court have any ability to identify particular claims which might best be tried in other courts. *See In re Johns-Manville Corp.*, 31 B.R. 627, 628 (S.D.N.Y. 1983) (court, with cooperation of claimants and debtor, will undoubtedly seek to design procedures for the adjudication or settlement of mass tort claims in a rational, consolidated fashion); *In re UNR Industries, Inc.*, 45 B.R. 322, 326 (N.D. Ill. 1984) ("the parties are certainly free to agree to a dispute resolution procedure that does not involve trial, and UNR may be correct that some such procedure would be best for all concerned.").

The premise underlying the court of appeals' decision, that immediate centralization of cases and claims pursuant to section 157(b)(5) was necessary to permit estimation of claims under section 502(c) of the Bankruptcy Code, is patently incorrect. Neither the existence of prepetition cases against the debtor, nor the fact that a venue determination for each bankruptcy claim has not yet been made under section 157(b)(5) has a direct bearing on estimation. The need for estimation and the shape that estimation proceedings, if any, might take in the Robins case have yet to be determined.[5] Section 157(b)(5) should not be invoked until after estimation is considered and a reorganization plan developed. *See In re Johns-Manville Corp.*, 45 B.R. 823 (S.D.N.Y. 1984). Thus, in linking its decision to estimation, the court of appeals, once again, turned the legislative scheme on its head.

---

[5] Estimation is not mandatory. Rather, it must be predicated, among other things, on a finding that resolution of a claim or claims is delaying the administration of the case. § 11 U.S.C. § 502(c).

The Harm to Claimants' Jury Trial Rights and to the Administration of the Bankruptcy Reorganization Process

The decision below could eviscerate the rights of 300,000 Dalkon Shield claimants to the right to trial by jury guaranteed them by the Bankruptcy Code. Under the ruling, claimants seeking a jury trial of their disputed claims may have to wait many years, perhaps indefinitely, for the liquidation of those claims in the Eastern District of Virginia. Such a result would make all but meaningless Congress' promise of a right to a jury trial to personal injury claimants of a debtor in bankruptcy.

This Court has reiterated that "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (*quoting Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). Delay for any significant period of time in according an individual a right to a civil jury trial he would otherwise receive is barred. *See Armster v. United States District Court for the Central District of California*, 792 F.2d 1423, 1430 (9th Cir. 1986) (suspension of civil jury trials for lack of funds for other than a most minimal period of time violates Seventh Amendment; three-and-a-half months held far more than a significant period); *accord Hobson v. Brennan*, Case No. 76-1326, slip op. (D.D.C. June 24, 1986). Here, where the right to jury trial is based on statute, these principles apply with full force and require that the decision below be accepted for review.

Apart from its impact on the rights of claimants in the Robins case, the decision below, if allowed to stand, would be a continuing source of confusion in bankruptcy cases. The proliferation of "mass torts" and mass tort litigation,[6] together with the increasing resort to bank-

[6] The phenomenon of numerous persons suffering the same or similar injuries as the result of the distribution of a defective

ruptcy by large business entities as a tool of business planning,[7] all but guarantee that the problems of venue and jury trial presented here will recur. Congress crafted the jury trial provisions of the 1984 Amendments in direct response to this growing phenomenon. The Court should exercise its power of review to correct the grave errors below and to prevent their replication in other mass tort bankruptcies.

---

product is becoming increasingly common. *See, e.g.*, D. Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv. L. Rev. 849, 853 (1984). The proliferation of mass torts is reflected in the fact that the words asbestos, Agent Orange, Bendectin, dioxin, and a string of acronyms —DES, PCB, PBB, and IUD—have become imprinted on our national consciousness and in our law books. *See, e.g., In re Johns-Manville Corp.*, 36 B.R. 727 (Bankr. S.D.N.Y. 1984) (asbestos); *In re "Agent Orange" Product Liability Litigation*, 565 F. Supp. 1263 (E.D.N.Y. 1983) (dioxin); *In re "Bendectin" Products Liability Litigation*, 102 F.R.D. 239 (S.D. Ohio 1984); *United States v. Vertac Chemical Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980) (dioxin); *Environmental Defense Fund v. EPA*, 598 F.2d 62 (D.C. Cir. 1978) (PCB); *Michigan Chemical Corp. v. Travelers Indemnity Co.*, 530 F. Supp. 147 (W.D. Mich. 1982), *rev'd*, 728 F.2d 374 (6th Cir. 1984) (PBB).

This list can be expected to grow. In our technically complex society, we are continually exposed to products which cause adverse health effects. In addition, we have daily contact with products whose possible adverse health effects are not yet known and may not be manifest for years after exposure. *See generally* Note, *Relief From Tort Liability Through Reorganization*, 131 U. Pa. L. Rev. 1227, 1231-32 (1983).

[7] The development began in 1982 when three companies—Johns-Manville, UNR and Amatex—sought relief from massive tort liabilities arising out of their manufacture of asbestos. *See* Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 Harv. L. Rev. 1121, 1121-22 (1983). A.H. Robins followed in 1985. Given the proliferation of mass torts, *see supra* note 3, business entities are increasingly likely to use Chapter 11 to deal with massive tort liability in the future. *See* M. Roe, *Bankruptcy and Mass Tort*, 84 Colum. L. Rev. 846, 846 n.1 (1984); Note, 96 Harv. L. Rev., *supra*, at 1122; Note, 131 U. Pa. L. Rev., *supra* note 6, at 1228.

CONCLUSION

For the reasons stated above, the Court should grant the petition and issue the requested writ.

Respectfully submitted,

MARK C. ELLENBERG
Counsel of Record

SHELDON L. PINE
JOEL KAUFMAN
CADWALADER, WICKERSHAM
& TAFT
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 862-2200

Counsel for Petitioner
Committee of Representatives
of Dalkon Shield Claimants

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2183

A. H. ROBINS COMPANY, INCORPORATED,
Appellee,

versus

ANNA PICCININ,
Appellant.

and

NANCY CAMPBELL, KATHRYN CONRAD, JEANETTE DICHARRY, VERNON DICHARRY, LUISA MOSA, STELLA J. CAMP, JOHN H. CAMP, HELEN BARNETT, MICHAEL BARNETT, and EDNA LINDSEY RUMINISKI,
Defendants.

AETNA CASUALTY AND SURETY COMPANY,
Intervenor/Appellee.

No. 85-2184

A. H. ROBINS COMPANY, INCORPORATED,
Debtor.

A. H. ROBINS COMPANY, INCORPORATED,
Appellee,

versus

COMMITTEE REPRESENTATIVES OF
DALKON SHIELD CLAIMANTS,
Appellants.

AETNA CASUALTY AND SURETY COMPANY,
Intervenor/Appellee.

No. 85-2185

A. H. ROBINS COMPANY, INCORPORATED,
Debtor.

A. H. ROBINS COMPANY, INCORPORATED,
Appellee,

versus

KATHRYN CONRAD, LUISA and JACK MOSA,
Appellants.

No. 85-2186

IN RE: A. H. ROBINS COMPANY, INC.,
Debtor.

A. H. ROBINS COMPANY, INC.,
Appellee,

versus

ANNA PICCININ,
Appellant.

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond
Robert R. Merhige, Jr., District Judge

Argued: December 3, 1985. Decided: April 10, 1986

Before RUSSELL and CHAPMAN, Circuit Judges, and SWYGERT, Senior Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

C. Neal Pope (Max R. McGlamry; Pope, Kellogg, McGlamry, Kilpatrick & Morrison; Robert L. Dolbeare on

brief) for Appellant Anna Piccinin; H. Robert Erwin, Jr. (Pretl & Schultheis, P.A. on brief) for Appellants Kathryn Conrad, Luisa Mosa and Jack Mosa; Mark C. Ellenberg (Murray Drabkin; Cadwalader, Wickersham & Taft; George B. Little; L. B. Cann, III; Little, Parsley & Cluverius, P.C. on brief) for Appellant Committee of Representatives of Dalkon Shield Claimants; Patrick A. Murphy (Penn Ayers Butler; Michael Kip Maly; Murphy, Weir & Butler; William R. Cogar; Bradfute W. Davenport, Jr.; Clifford W. Perrin, Jr.; James S. Crockett, Jr.; Mays, Valentine, Davenport & Moore on brief) for Appellee; Jan Z. Krasnowiecki for Intervenor.

RUSSELL, Circuit Judge:

Confronted, if not overwhelmed, with an avalanche of actions filed in various state and federal courts throughout the United States by citizens of this country as well as of foreign countries seeking damages for injuries allegedly sustained by the use of an intrauterine contraceptive device known as a Dalkon Shield,[1] the manufacturer of the device, A.H. Robins Company, Incorporated (Robins) filed its petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et. seq.*, in August, 1985.

Background

The device, which is the subject of these suits, had been developed in the 1960's by Dr. Hugh Davis at the Johns Hopkins Hospital in Baltimore, Maryland.[2] In mid-1970 Robins acquired all patent and marketing rights to the Dalkon Shield and engaged in the manufacture and

---

[1] For the current FDA regulation on intrauterine devices, *see* 21 C.F.R. § 310.502 (1984).

[2] Book Note, 99 Harv.L.Rev. 875 (1986) (reviewing Engelmayer and Wagman, *Lord's Justice: One Judge's Battle to Expose the Deadly Dalkon Shield I.U.D.* (1985)).

marketing of the device from early 1971 until 1974, when it discontinued manufacture and sale of the device because of complaints and suits charging injuries arising allegedly out of the use of the device. The institution of Dalkon Shield suits did not, however, moderate with the discontinuance of manufacture of the device, since Robins did not actually recall the device until 1984.[3] By the middle of 1985, when the Chapter 11 petition was filed the number of such suits arising out of the continued sale and use of the Dalkon Shield device earlier put into the stream of commerce by Robins had grown to 5,000. More than half of these pending cases named Robins as the sole defendant; a co-defendant or co-defendants were named in the others. Prior to the filing, a number of suits had been tried and, while Robins had prevailed in some of the actions, judgments in large and burdensome amounts had been recovered in others. Many more had been settled.[4] Moreover, the costs of defending these suits both to Robins and to its insurance carrier had risen into the millions. A large amount of the time and energies of Robins' officers and executives was also being absorbed in preparing material for trial and in attending and testifying at depositions and trials. The problems arising out of this mounting tide of claims and suits precipitated this Chapter 11 proceeding.

The filing of the Chapter 11 petition automatically stayed all suits against Robins itself under section 362(a) of the Bankruptcy Code, even though no formal order of

---

[3] In response to that recall, Engelmayer & Wagman, *supra*, note 2, at 878, n.8, state that 4,500 women had removed the shield as of August, 1985, at a cost of $1,600,000.

[4] Engelmayer & Wagman, *supra*, note 2, at 876, n.6, state that of the approximately 7,500 Dalkon Shield cases settled from 1972 to February 1985, fewer than 40 went to a jury.

A recent article in the Nat. L.J., p. 10, (March 17, 1986), states that by mid 1985, Robins, along with its insurer, Aetna Casualty & Surety Company, "had paid roughly $517 million for 25 trial judgments and 9,300 settlements since the first verdict in 1975."

stay was immediately entered. *See In re Larmar Estates*, 5 B.R. 328, 330 (Bankr. E.D.N.Y. 1980). But a number of plaintiffs in suits where there were defendants other than Robins, sought to sever their actions against Robins and to proceed with their claims against the co-defendant or co-defendants. Robins responded to the move by filing an adversary proceeding in which it named as defendants the plaintiffs in eight such suits pending in various state and federal courts. In that proceeding, the debtor sought (1) declaratory relief adjudging that the debtor's products liability policy with Aetna Casualty and Insurance Company (Aetna) was an asset of the estate in which all the Dalkon Shield plaintiffs and claimants had an interest and (2) injunctive relief restraining the prosecution of the actions against its co-defendants. Service of the summons and complaint in that adversary proceeding, a memorandum of law in support of the motion for a preliminary injunction therein, a notice of the debtor's intention to apply for a temporary restraining order, a copy of the proposed temporary restraining order and affidavits in support were duly mailed by first-class mail and by Federal Express to all the defendants and their attorneys at their addresses. *See* Bankruptcy Rule 7004 and Rule 4, Fed. R. Civ. P.

The debtor's application for a temporary restraining order and for the setting of a date for a hearing on the request for preliminary injunction in the adversary proceeding was heard *ex parte* by the district judge who had jurisdiction over the proceedings.[5] The district judge granted at the time a temporary restraining order in the proceedings and set a hearing on the debtor's application

---

[5] Section 151 of the 1984 Amendments to the Bankruptcy Code provides that "[i]n each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for the district. Each bankruptcy judge . . . may exercise the authority conferred under this chapter . . . except as otherwise provided by law or by rule or order of the district court."

for a preliminary injunction. On that same day, Robins mailed by first-class mail and by Federal Express to all the defendants and their attorneys at their addresses "Notices of Hearing on Plaintiff's Motion for Preliminary Injunction."

At the hearing on the motion for a preliminary injunction, a number of defendants as well as the Committee constituted by the court to represent Dalkon Shield Claimants appeared by counsel.[6] At the commencement of the hearing the defendant Piccinin, a plaintiff in one of the Dalkon Shield actions which Robins sought to stay, filed through her attorney a written motion to dismiss as against her. No other defendant filed a motion in response to the motion for a preliminary injunction. After receiving certain testimony, admitting various records, and hearing arguments of parties, the district court granted Robins' request for a preliminary injunction.

In his order granting the preliminary injunction, the district judge found (1) that continuation of litigation in the civil actions threatened property of Robins' estate, burdened and impeded Robins' reorganization effort, contravened the public interest, and rendered any plan of reorganization futile; (2) that this burden on Robins' estate outweighed any burden on the Dalkon claimants caused by enjoining their civil actions; and (3) that all remaining insurance coverage in favor of the debtor under its liability policy issued by Aetna was property of the Robins' Chapter 11 estate. The district judge then held that all actions for damages that might be satisfied from proceeds of the Aetna insurance policy were subject to the stay pursuant to 11 U.S.C. § 362(a)(1)(3) and enjoined further litigation in the eight civil actions, pursuant to 11 U.S.C. § 362(a)(1)(3) as supplemented by 11 U.S.C. § 105.

---

[6] For a discussion of the authorization for and responsibilities of such Committees, *see* Note, *The Chapter 11 Creditors' Committee: Statutory Watchdog?* 2 Bankr. Dev. J., 247 (1985).

Only the defendants Piccinin, the Mosas, and Conrad filed timely notices of appeal from the grant of the preliminary injunction. Their appeals, questioning the propriety of that preliminary injunction as against suits by Robins' co-defendants is the first of the issues now before this Court.

Some three weeks after entry of the preliminary injunction, Robins filed a motion for (1) a determination of trial venue of all Dalkon Shield suits, (2) identification of such Dalkon Shield cases as were "related to" the Chapter 11 case, and (3) transfer of such cases to the Eastern District of Virginia for trial. It also requested an expedited hearing on these motions. This request for an expedited hearing was granted and the expedited hearing was set ten days later. Notice of the hearing was given the Representatives of the Dalkon Shield Claimants Committee and the Unsecured Creditors Committee. The Committees and the defendants Piccinin, the Mosas and Conrad appeared by counsel at the hearing and joined in entering objections to the motion.

After a hearing on the motions, the district judge entered an order holding that (1) pursuant to 28 U.S.C. § 1334(b), all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield were proceedings related to this Chapter 11 case over which this court had jurisdiction; (2) pursuant to 28 U.S.C. §§ 157(b)(5)[7] and 1334(b), all such actions, wherever pending, were to be tried in the Richmond Division of the United States District Court for the Eastern District of Virginia; (3) all actions related to the Robins' Chapter 11 case now pending in any federal district court or subsequently removed to any federal district court,

---

[7] In Chatz & Schumm, *1984 Bankruptcy Code Amendments—Fresh from the Anvil*, 89 Com.L.J., 317, 319-20 (1984), the authors refer to these two sections as the "critical sections" of the Amendments, establishing as they do what "a bankruptcy court can and cannot do."

during the pendency of this Chapter 11 case, were to be transferred to this court [the Richmond Division of the United States District Court]; and (4) nothing in the order limited the power of this court [the Richmond Division of the United States Court] later to abstain from hearing any proceeding under section 1334(c)(1) or remanding under section 1452(b), 28 U.S.C.

From this order, the Committee of Representatives of Dalkon Shield Claimants and the defendant Piccinin have appealed.[8] This appeal poses the second issue on appeal.

I

The initial question in the appeal of the first issue relates to the court's jurisdiction to grant a stay or injunction of suits in other courts against co-defendants of the debtor or of third parties; none of the parties herein contest the jurisdiction of the bankruptcy court to stay actions against the debtor itself in any court. Jurisdiction over suits involving co-defendants or third-parties may be bottomed on two statutory provisions of the Bankruptcy Act itself as well as on the general equitable powers of the court. The first of these statutory grants of jurisdiction is found in section 362, 11 U.S.C. The purpose of this section by its various subsections is to protect the debtor from an uncontrollable scramble for its assets in a number of uncoordinated proceedings in different courts, to preclude one creditor from pursuing a remedy to the disadvantage of other creditors, and to provide the debtor and its executives with a reasonable respite from protracted litigation, during which they may have an opportunity to formulate a plan of reorgnization for the debtor. *Matter of Holtkamp*, 669 F.2d 505, 508 (7th Cir. 1982). As the Court in *Fidelity Mortg. Investors v. Camelia Builders, Inc.*, 550 F.2d 47, 55 (2d Cir.

[8] An order of the Honorable H. Emory Widener, Jr., after a motion for a stay pending appeal, permitted Aetna to intervene. Aetna appears in the appeal.

1976), *cert. denied*, 429 U.S. 1093, put it, "[t]he stay insures that the debtor's affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditors' interests with one another."

Section 362 is broken down into several subsections, only two of which are relevant on this appeal. The first of such subsections is (a)(1), which imposes an automatic stay of any proceeding "commenced or [that] could have been commenced against the debtor" at the time of the filing of the Chapter 11 proceeding; the second is (a)(3), which provides similar relief against suits involving the possession or custody of property of the debtor, irrespective of whether the suits are against the debtor alone or others. We shall discuss the extent of jurisdiction given the bankruptcy court under these two subsections, beginning with (a)(1).

(a)

Subsection (a)(1) is generally said to be available only to the debtor, not third party defendants or co-defendants. The rationale for this narrow construction of the statute has been stated in *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1196-1197 (6th Cir. 1983), and in our own case of *Williford v. Armstrong World Industries, Inc.*, 715 F.2d 124, 126-27 (4th Cir. 1983), and it need not be repeated here. However, as the Court in *Johns-Manville Sales Corp.*, 26 B.R. 405, 410 (S.D.N.Y. 1983) remarked, in discussing the oft-cited case, *Royal Trucks & Trailer v. Armadors Meritina Salvadoreana*, 10 B.R. 488, 491 (N.D.Ill. 1981),[9] "there are cases [under 362(a)(1)] where a bankruptcy court may properly stay the proceedings against non-bankrupt co-defendants" but, it adds, that in order for relief for such non-bankrupt defendants to be available under (a)(1), there must

[9] This case is generally cited on the strict construction of this subsection.

be "unusual circumstances" and certainly "'[s]omething more than the mere fact that one of the parties to the lawsuit has filed a Chapter 11 bankruptcy must be shown in order that proceedings be stayed against non-bankrupt parties.'" This "unusual situation," it would seem, arises when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor. An illustration of such a situation would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case. To refuse application of the statutory stay in that case would defeat the very purpose and intent of the statute. This fact was recognized by the court in *In Re Metal Center*, 31 B.R. 458 (D.Conn. 1983).

In *Metal Center* the third-party plaintiff had been sued, along with the debtor, on his guaranty of the debtor's obligation. The third-party was entitled to be indemnified by the debtor on account of any judgment rendered against him on account of his guaranty. While the action against both the debtor and the guarantor was pending, the debtor filed its Chapter 11 petition. The action was stayed against the debtor but the plaintiff sought to continue his suit against the guarantor. The guarantor at this point moved to stay the action as against him. The bankruptcy court reviewed the motion because of the possible "effect upon the debtor of a state court judgment against Gardner [the guarantor]." In discussing the issue, the court first dismissed as inapplicable to the facts of this case the situation where the third-party defendant was "independently liable as, for example, where the debtor and another are joint tort feasors or where the nondebtor's liability rests upon his own breach of duty." It noted that in such a case "the automatic stay would clearly not extend to such non debtor." But, in contrast

to those situations, it declared that "where, however, a debtor and nondebtor are so bound by statute or contract that the liability of the nondebtor is imputed to the debtor by operation of law, then the Congressional intent to provide relief to debtors would be frustrated by permitting indirectly what is expressly prohibited in the Code." It concluded with the statement: "Clearly the debtor's protection must be extended to enjoin litigation against others if the result would be binding upon the debtor's estate," and this is so, whether the debtor is a party or not. 31 B.R. at 462.

It is true that, although the third-party defendant in *Metal Center* was found to be entitled to indemnity from the debtor, the court held that the situation was not such as to qualify for a stay under section 362(a)(1). The court reached this conclusion because in its opinion the judgment in the suit against the third-party would not be binding on the bankruptcy court. Of course, if the indemnitee, who has suffered a judgment for which he is entitled to be absolutely indemnified by the debtor, cannot file and have allowed as an adjudicated claim the actual amount of the judgment he has suffered but must submit his claim for allowance in the bankruptcy proceeding with the prospect that his claim may not be allowed in the full amount of the judgment awarded against him, the indemnitee will be unfairly mulcted by inconsistent judgments and his contract of indemnity in effect nullified. We do not accept such reasoning with its shocking result and would find a stay under (a)(1) acceptable. Apparently the court in *Metal Center* recognized the inconsistency and the injustice resulting from its refusal to sustain a stay under (a)(1) for *it did grant a stay* of the action against the third-party but *on equitable grounds*, finding in justification that "severing and remanding [the plaintiff's action against the indemnitee to the state court for trial and judgment would] . . . potentially expose[s] Gardner [the indemnitee] to inconsistent judg-

ments." 31 B.R. at 463. While, as we have said, it seems that a ruling sustaining the stay in that case under section 362(a)(1) would have been more logical and appropriate, it is unimportant whether the stay is granted under section 362(a)(1) or on equitable grounds: the result is the same; a stay is proper in such a situation.

In *Seybolt v. Bio-Energy of Lincoln, Inc.*, 38 B.R. 123 (D. Mass. 1984), the issue was similar to that in *Metal Center, i.e.*, whether a guarantor entitled to indemnity by the debtor would be entitled to seek a stay under section 362(a)(1). In granting the stay in that case, the Court, after quoting the language of *Metal Center* with respect to the case in which "the liability of the non-debtor is imputed to the debtor by operation of law," said:

> The concept that notice and an opportunity to defend binds the principal on a judgment against a guarantor (in a case in which the principal did not participate) springs from notions of res judicata. If George Seybolt recovers a judgment against the guarantors in the state court, Bio-Energy Associates' assertion that the $100,000 was not a loan but a contribution to capital may well be rendered moot when the guarantor subsequently asserts a claim against it for indemnity. At the very least, the dual litigation of these issues in the state court and the bankruptcy court is not judicially economic and potentially exposes Bio-Energy, Inc., and Bio-Energy Associates to inconsistent judgments. *See In re Metal Center, Inc., supra*, at 463.
>
> Accordingly, I find that George Seybolt's claims against the individual guarantors are within this Court's jurisdiction and should be stayed until an appropriate motion for relief from stay is filed and granted by the bankruptcy court. 38 B.R. at 127-28.

In Re Brentano's, 27 B.R. 90 (S.D.N.Y. 1983), also involved the situation of a guarantor of a debtor in a

Chapter 11 proceeding who was entitled under contract to indemnity by the debtor against any judgment against him. While the case did not directly concern section 362 but the question of bankruptcy jurisdiction, the language of the court appears relevant on the issue under review here. It said that the action against the guarantor-indemnitee "could and would affect the estate in bankruptcy," since, under the indemnity agreement, "a judgment in favor of the [plaintiff] in the guaranty action would automatically result in indemnification liability against Brentano's" [*i.e.*, the indemnitor]. Accepting this language one would have difficulty in not concluding that the action was in effect one against the debtor and as such would qualify for relief under (a)(1). *Brentano's* is cited and discussed in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 995 (3d Cir. 1984), which was an asbestos case. The issue in *Pacor*, as in *Brentano's*, was one of bankruptcy jurisdiction. The court described the facts in *Brentano's* and stated the resulting legal situation as follows:

> In *Brentano's*, however, it is clear that the action between the landlord and MacMillan could and would affect the estate in bankruptcy. By virtue of the indemnification agreement between Brentano's and MacMillan, a judgment in favor of the landlord on the guarantee action would automatically result in indemnification liability against Brentano's. *See also In re Johnie T. Patton, Inc.*, 12 B.R. 470 (Bankr. D. Nev. 1981); *In re Lucasa International, Ltd.*, 6 B.R. 717 (Bankr. S.D.N.Y. 1980); *In re Brothers Coal Co.*, 6 B.R. 567 (Bankr. W.D. Va. 1980) (all involving guarantors of debtor's obligations). Moreover, even in the absence of an explicit indemnification agreement, an action by a creditor against a guarantor of a debtor's obligations will necessarily affect that that [sic] the creditor's status vis a vis other creditors, and administration of the

> estate therefore depends upon the outcome of that litigation. 743 F.2d at 995.

Pacor, however, found *Brentano's* inapplicable in its case because:

> In this case, however, there would be no automatic creation of liability against Manville on account of a judgment against Pacor. Pacor is not a contractual guarantor of Manville, nor has Manville agreed to indemnify Pacor, and thus a judgment in the Higgins-Pacor action could not give rise to any automatic liability on the part of the estate. 743 F.2d at 995.

The clear implication of the decision is that, if there had been a contract to indemnify, a contrary result would have been in order.

(b)

But (a)(1), which stay actions against the debtor and arguably against those whose interests are so intimately intertwined with those of the debtor that the latter may be said to be the real party in interest, is not the only part of section 362 providing for an automatic stay of proceedings. Subsection (a)(3) directs stays of any action, *whether against the debtor or third-parties*, to obtain possession or to exercise control over property of the debtor. A key phrase in the construction and application of this section is, of course, "property" as that term is used in the Act. Section 541(a)(1) of the Bankruptcy Act defines "property" in the bankruptcy context. It provides that the "estate is comprised of all the following property, wherever located . . . all legal or equitable interests of the debtor in property as of the commencement of the case." The Supreme Court in construing this language in *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205, n.9, quoted this language in the legislative history of the Section:

> The scope of this paragraph [541(a)(1)] is broad. It included all kinds of property including tangible or intangible property, causes of action (see Bankruptcy Act § 70a(6)), and all other forms of property currently specified in section 70a of the Bankruptcy Act.

Under the weight of authority, insurance contracts have been said to be embraced in this statutory definition of "property." *In re Davis*, 730 F.2d 176, 184 (5th Cir. 1984). For example, even the right to cancel an insurance policy issued to the debtor has uniformly been held to be stayed under section 362(a)(3). Lam, *Cancellation of Insurance: Bankruptcy Automatic Stay Implications*, 59 Am. Bank. L.J., 267 (1985), (extensively reviewing the cases to this effect). A products liability policy of the debtor is similarly within the principle: it is a valuable property of a debtor, particularly if the debtor is confronted with substantial liability claims within the coverage of the policy in which case the policy may well be, as one court has remarked in a case like the one under review, "the most important asset of [*i.e.*, the debtor's] estate," *In re Johns-Manville Corp.*, 40 B.R. 219, 229 (S.D.N.Y. 1984). Any action in which the judgment may diminish this "important asset" is unquestionably subject to a stay under this subsection. *In re Johns-Manville, Corp.*, 33 B.R. 254, 261 (S.D.N.Y. 1983). Accordingly actions "related to" the bankruptcy proceedings against the insurer or against officers or employees of the debtor who may be entitled to indemnification under such policy or who qualify as additional insureds under the policy are to be stayed under section 362(a)(3). *Ibid.*[10]

---

[10] There is nothing in *In Re White Motor Credit*, 761 F.2d 270, 274 (6th Cir. 1985) in any way contrary to this conclusion; in fact, it sustains the construction of the statute adopted by us. In *White*, the parties were in agreement that the products liability insurance was adequate to cover all claims filed but the court cau-

(c)

The statutory power of the bankruptcy court to stay actions involving the debtor or its property is not, however, limited to section 362(a)(1) and (a)(3). It has been repeatedly held that 11 U.S.C. § 105 which provides that the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," "empowers the bankruptcy court to enjoin parties other than the "bankrupt" from commencing or continuing litigation. *In re Otero Mills, Inc.*, 25 B.R. 1018, 1020 (D.N.M. 1982).[11] In that case, the Court said:

---

tioned that had this not been so, the result in that case would have been different:

> Were it not for the fact that all parties are in agreement that the insurance coverage is adequate to cover all filed claims, it would be necessary to liquidate all claims before any insurance was paid out; otherwise, some claimants would receive an unequal portion of the insurance assets of the debtor.

It is obvious from that statement of the court that *White* actually sustains the result reached by us that, if the liability insurance is inadequate to satisfy in full all claims under the insurance, the actions by claimants should be stayed and the claims should be "liquidated" in the bankruptcy court.

[11] There can be no dispute that the Bankruptcy Reform Act of 1978 and like language later in section 1334(b) of the Bankruptcy Amendments of 1984 greatly enlarged the jurisdiction of the bankruptcy courts and were, as stated in the legislative history, intended to "leave no doubt as to the scope of the bankruptcy court's jurisdiction over disputes." H. Rep. No. 95-595, 95th Cong. 2d Sess. 445, *reprinted in* 1978 U.S. Code Cong. & Adm. News, 5963, 6401. Those sections provide jurisdiction in the bankruptcy case over any proceedings arising in or related to a title 11 case. The accepted definition of the "related to" in these statutes is that declared in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984):

> An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way

Appellant cites only one case decided under the 1978 Bankruptcy Code which found that the bankruptcy court lacked [under § 105] the power to enjoin parties from pursuing actions against non-bankrupts in state court. *In re Aboussie Brothers Construction Co.*, 8 B.R. 302 (D.C.E.D. Mo. 1981). In *Aboussie*, the court did not address § 105(a), but relied on cases decided under the old Bankruptcy Act to hold that there was no jurisdiction to enjoin parties from pursuing actions which did not involve the bankrupt directly. The pre-1978 Act confined jurisdiction to "the debtor and his property, wherever located." Act of June 22, 1938, ch. 575, § 1, 52 Stat. 906 (1938). Under the new Bankruptcy Code, the jurisdictional statute provides that the bankruptcy court shall have jurisdiction "of all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C.A. § 1471 (Supp.

---

impacts upon the handling and administration of the bankrupt estate.

See also Note, *Selective Exercise of Jurisdiction in Bankruptcy-Related Civil Proceedings*, 59 Tex. L. Rev. 325, 330-31 (1981):

> One can imagine controversies over which the new bankruptcy courts [under 1471(b)] would have jurisdiction even if neither the debtor nor a representative of the estate were a party, and it is difficult to imagine any instance in which a bankruptcy court would not have jurisdiction if the debtor were a party.

It is true that both *Pacor* and the Texas Note were referring to section 1471(b) of the 1978 Act. That section, however, was reenacted in the exact words of the repealed 1471(b) in section 1334(a) and (b) of the 1978 Act. Therefore, "[t]he jurisdiction conferred on the district court [under the 1984 Act's section 1334(a) and (b)] is exactly the same jurisdiction that was conferred on the district courts under the Bankruptcy Reform Act [of 1978]." Taggart, *The New Bankruptcy Court Systems*, 59 Am. Bank. L.J. 231, 239 (1985). To the same effect, King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 Vand. L. Rev. 675, 677 (1985).

1982). This broader jurisdictional statute, combined with § 105(a), grants the bankruptcy court power to enjoin parties from proceeding in state court against non-bankrupts where the state proceeding is related to a case arising under Title 11. 25 B.R. at 1020.

In stating the same scope for section 105, the Court in *Johns-Manville Corp.*, 26 B.R. 420, 425 (S.D.N.Y. 1983), quoting from 2 Collier on *Bankruptcy* §§ 362.02 and 362.05 (15th ed. 1982), put the matter thus:

> [Section 362 of the Code] does not attempt to state the jurisdiction of the bankruptcy court with respect to stays and injunctive relief or to determine the boundaries of the exercise of the court's injunctive power.
>
> Section 105 which is the successor to Section 2A(15), gives the court the power to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.
>
> [T]he exceptions to the automatic stay of § 362(a) which are set forth in § 362(b) are simply exceptions to the stay which protect the estate automatically at the commencement of the case and are not limitations upon the jurisdiction of the bankruptcy court or upon its power to enjoin. That power is generally based upon § 105 of the Code. The court will have ample power to enjoin actions excepted from the automatic stay which might interfere in the rehabilitative process whether in a liquidation or in a reorganization case.

See to the same effect, In Re Landmark, 19 B.R. 556, 559 (N.D. Ohio 1982); *In Re Larmar Estates, Inc.*, 5 B.R. 328, 330-31 (S.D.N.Y. 1980).

Accepting that section 105 confers on the bankruptcy court power under its expanded jurisdiction as expressed

in section 1471(b) [28 U.S.C.] of the Bankruptcy Reform Act of 1978 Act and now section 1334(b), 28 U.S.C. of the 1984 Bankruptcy Amendments to enjoin suits against parties in other courts, whether state or federal, it is necessary to mark out the circumstances under which the power or jurisdiction may be exercised. In *Otero Mills, supra,* the Court approved a ruling that "[t]o so enjoin a creditor's action against a third party, the court must find that failure to enjoin would effect [sic] the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through the third party." 25 B.R. at 1020. In *Johns-Manville,* the Court phrased somewhat fuller the circumstances when section 105 may support a stay:

> In the exercise of its authority under § 105, the Bankruptcy Court may use its injunctive authority to "protect the integrity of a bankrupt's estate and the Bankruptcy Court's custody thereof and to preserve to that Court the ability to exercise the authority delegated to it by Congress" [citing authority]. Pursuant to the exercise of that authority the Court may issue or extend stays to enjoin a variety of proceedings [including discovery against the debtor or its officers and employees] which will have an adverse impact on the Debtor's ability to formulate a Chapter 11 plan. 40 B.R. at 226.

(d)

Beyond these statutory powers under section 362 and section 105 to enjoin other actions whether against the debtor or third-parties and in whatsoever court, the bankruptcy court under its comprehensive jurisdiction as conferred by section 1334, 28 U.S.C., has the "inherent power of courts under their general equity powers and in the efficient management of the dockets to grant relief" to grant a stay. *Williford v. Armstrong World Industries, Inc., supra,* 715 F.2d at 127, *Austin v. Unarco Industries,*

Inc., 705 F.2d 1, 5 (1st Cir. 1983). In exercising such power the court, however, must "weigh competing interests and maintain an even balance" and must justify the stay "by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford*, *supra*, *Metal Center* and *Seybolt*, discussed *supra*, are illustrative of situations in which courts have found sufficient grounds to grant a stay under this power.

(e)

There are thus four grounds on which the bankruptcy court may enjoin suits against the bankrupt or its assets and property. In some instances only one of these grounds may be relevant; in an involved and complex case, several or even all of the grounds may require consideration. The present case is such an involved and complex case. It has a striking similarity to a Chapter 11 proceedings, initially begun in the bankruptcy court of the Southern District of New York, concerning the reorganization of the Johns-Manville Corporation. In that proceeding, which was litigated both in the New York and Louisiana courts, many of the issues posed on this aspect of the case were raised and analyzed by the courts of the two circuits and the decisions resolving such issues present in a practical form the application of the power of a bankruptcy court to stay actions relating to the bankruptcy proceedings against the debtor, its property and their operations. For this reason, it seems pertinent to review the decisions in those proceedings, for their guidance on the resolution of the issue herein. We begin with the initial proceedings in the bankruptcy court of the Southern District of New York.

(f)

Johns-Manville, an asbestos producer, was beset by a mass of suits seeking large awards for damages sustained by reason of asbestos exposure much as has Robins in this

case and, after suffering large and burdensome recoveries by plaintiffs and making substantial settlements in many of the cases, filed its Chapter 11 petition in the Southern District of New York in August, 1982. Such filing operated as an automatic stay of all proceedings against Johns-Manville. However, many of the thousands of cases named as defendants not only Johns-Manville but a number of other asbestos producers and dealers as co-defendants. Shortly after Johns-Manville filed its Chapter 11 petition, these co-defendants, charged in the complaints of the plaintiffs in the actions as joint tort feasors, sought judicial relief in the bankruptcy court, "inviting," that court by way of a declaratory judgment in the exercise of "its equitable powers" to enlarge the automatic stay provided by section 362 of the Act to include nondebtor defendants "under the penumbra of section 362's protection" as well as under section 105, and to extend this stay throughout the nation to all asbestos litigation. *Matter of Johns-Manville Corp.*, 26 B.R. 405 (S.D.N.Y. 1983). The primary issue at this stage was stated to be "whether this Court should take the unprecedented step of exercising its discretion pursuant to section 105 of the Code to extend the section 362 automatic stay so as to encompass the co-defendants herein." 26 B.R. at 408-409. The bankruptcy court ruled, first, "that section 362 is limited in scope to the debtor and does not operate to stay actions against the co-defendants of this debtor." 26 B.R. at 409-414. Secondly, it held that relief under section 105 is only available if found to be "necessary or appropriate in order to achieve the goals of a Chapter 11 reorganization," and, even then, only after a finding that "a failure to enjoin would affect the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through that third-party," thereby justifying a finding of irreparable injury and likelihood of prevailing on the merits. None of these facts the court found present on the instant showing, but it added:

> In an appropriate case, where the proposed extension of the stay is designed to cover actions against entities that truly are inextricably interwoven with the debtor or which affect property of the debtor's estate, section 105 may be used. *In the instant case, such is not the situation as any liability of these co-defendants is not directly attributable to the debtor as it would be if these co-defendants were, for example, key employees of the debtor.* 26 B.R. at 418 (italics in text).

It concluded by declaring that there was "no basis [as shown by the record] to extend the section 362 stay to cover them [the appeals] by means of section 105."

A second action was begun shortly afterwards, this time by the debtor, to enjoin (1) the prosecution of "proceedings against Manville's employees, agents and others" and of discovery proceedings involving them in actions covering "the same issues and subject-matter as are involved in the stayed litigations against Manville," (2) " 'direct action' lawsuits against insurers and sureties of the debtor" [12] since the coverage of such policies of insurance or suretyship "represent[ed] property of [the debtor's] estate which must be preserved for the benefit of all creditors," and (3) a suit brought by certain security holders against "various of the 'employees, agents and others' " in the district court of Colorado. *In re Johns-Manville Corp.*, 26 B.R. 420, 423 (S.D.N.Y. 1983). It will be observed that this proceeding involved matters not litigated in the earlier proceeding; in fact, it involved actions against the debtor's employees for actions attributable to Manville, precisely the point which the court in the earlier case had said was not before it at that time. The bankruptcy court granted a temporary injunction

---

[12] "Direct actions" against insurers are described in *Wedgeworth v. Fiberboard Corp.*, 706 F.2d 541, 546-47 (5th Cir. 1983), and were recognized in *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48, 50 (1964).

against the continuance of either the suits or of discovery against present or future officers, employees and agents but refused a stay for past officers and employees. In reaching that conclusion it found that "in great measure the suits being pursued against Manville's officers and employees are in reality derivatives of identical claims brought against Manville," which, if sustained against the officers and employees, would expose the estate "to claims for contribution and indemnification" and might result in collateral estoppel against the debtor "in subsequent actions." 26 B.R. at 426. It accordingly held it proper to stay these actions and discovery "against [such] non-debtors which would frustrate the statutory scheme or impact adversely on a debtor's ability to formulate a plan or on the debtor's property." 26 B.R. at 427. It further granted the injunction against the security action, finding "that [such] suit is nothing more than an effort to circumvent section 362 by suing Manville's officers and directors when the real party in interest is Manville. In all but formal detail, the [security] litigation is against the debtor within the meaning of section 362." 26 B.R. at 428. It, also, said that:

> An adverse judgment in the [security] case would have serious consequences for the debtor's estate. Manville's By-Laws require it to indemnify its officers and directors for their litigation expenses, including any amounts paid to satisfy a judgment of liability, so long as the conduct at issue was intended to benefit the company . . . . Although Manville believes that the insurance policies which it had in force cover these expenses, the insurance company has reserved its right to contest coverage and to terminate on 30 days notice the payment of defense costs. If the insurance company fails to live up to its obligations, the officers and directors would look to the Company for reimbursement pursuant to the By-Laws. In any event, the policies have specific dollar limits beyond which Manville itself must pay.

> To the extent expenditures related to the (security) suit exhaust those limits, an asset of the estate is diminished and Manville's exposure in other litigations increases. 26 B.R. at 429.

But it denied a stay of the suits against the insurers and sureties, saying:

> Unlike suits against the debtor's employees and agents, Manville maintains no obligation to indemnify or pay for the defense costs of its insurers or sureties. Thus, the liability of these insurers and sureties in no way inures to the detriment of the Manville estate. 26 B.R. at 431.

On motion for rehearing, however, the bankruptcy court withdrew its decision denying an injunction against suits directed against the debtor's insurers and granted such injunction. It did so on the basis of these findings:

> The debtor "could be adversely affected by the continuation of such suits" since the "insurance policies and proceeds thereof and the causes of action previously asserted by Manville against its insurance carriers in suits pending in California ("California Insurance Litigation") and elsewhere constitute substantial property of the Manville estate which will be diminished if and to the extent that third party direct actions against the insurance carriers result in plaintiffs' judgments" and since "important issues respecting policy coverage and liability may be pressed as collaterally estopping Manville." 26 B.R. at 435. Further, "[t]o permit the third party actions to continue against Manville's insurance carriers will result in a multiplicity of positions and defenses on the part of the insurance carriers and will most likely result in inconsistent decisions and rulings concerning the coverage and liability of the insurance carriers to the third party claimants and to Manville. Such a disorganized and

fragmented procedure for resolving such major issues will undermine Manville's attempt at reorganization." 26 B.R. at 436.

It ended with these legal conclusions:

1. "Manville's rights under its insurance policies and all the causes of action arising thereunder constitute property of the Manville estates within the purview of section 541(a) of the Code." 26 B.R. at 436.

2. "Pursuant to § 105(a), the Bankruptcy Court may extend the automatic stay under § 362 of the Code to stay and enjoin proceedings or acts against non-debtors where such actions would interfere with, deplete or adversely affect property of Manville's estates or which would frustrate the statutory scheme of Chapter 11 or diminish Manville's ability to formulate a plan of reorganization." 26 B.R. at 436.

3. Pursuant to § 362(a) of the Code, all actions "to obtain possession of or interfere with property from Manville estates" are stayed and enjoined. 26 B.R. 436.

As a result of action in the Fifth Circuit to which we later advert and in order to enlarge the stay theretofore granted to include *past* officers and employees, (the court having reached the decision that suits against past as well as present employees of the debtor should be stayed) the bankruptcy court in New York entered a third reported decision in 33 B.R. 254 (S.D.N.Y. 1983). It found that:

In the event of a recovery against the past or present officers, directors or employees of Manville in any of the pending 1,000 cases, Manville's insurers may be called upon to indemnify such officers, directors and employees under the provisions of the policies issued by them to Manville. If such

> insurers are called upon to make such indemnification payments, those payments may cause an asset of the Manville estates to be diminished. 33 B.R. at 261.

It reiterated in this same decision its ruling that the insurance policies constituted assets of the debtor, and stated the test for granting a stay or injunction in the circumstances: "(a) possible irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." It concluded by granting the stay in favor of the insurers and the past as well as present directors, officers and employees, finding that the required findings for a preliminary injunction had been satisfied. 33 B.R. at 262-63.

On appeal of certain of these decisions, the district court affirmed the decisions of the Bankruptcy Court staying discovery of any officers, directors or employees of the debtor and ruled that the provisions of section 362 stayed proceedings against the debtor's insurers. Specifically, it declared that "the fact that it [Manville] ultimately may not receive all of the proceeds under its products liability insurance does not affect its status as property under the Code subject to the provisions of the automatic stay." 40 B.R. at 230.

At the same time that these Johns-Manville cases were proceeding in New York, similar issues were arising in asbestos cases filed against Johns-Manville, other joint tortfeasors, and their insurers in the three districts of Louisiana. The three district courts had ruled differently on the right to a stay of all co-defendants of Manville, there being no dispute that the stay was proper of Manville itself. On appeal, the Court of Appeals held in *Wedgeworth v. Fiberboard*, 706 F.2d 541 (5th Cir.

1983), that the automatic stay applied only to Manville, not to the other defendants and that the showing as made was insufficient to sustain a stay in favor of the co-defendants under equitable principles; however, it sustained the right of the plaintiffs to amend their complaints to state a "direct action" under the Louisiana statute against Manville's insurer and held that such an action was not stayed by any provision of the Bankruptcy Act. After a petition for rehearing, however, the Court modified its decision on the plaintiffs' motion to amend and held "that the district court did not abuse its discretion in declining to permit the plaintiffs to amend their complaints to add, as party defendants, the liability insurance carriers of Johns-Manville and Unarco." 706 F.2d at 548. Two days after this decision was filed, the bankruptcy court modified its previous orders by staying "any and all suits against any past, present or future Manville officer, director or employee or against [his or her] insurers." It added in this order, also, that its prior order would be amended to preclude discovery of the parties against whom suits were proscribed. In an appeal based on a petition for certiorari and for a writ of prohibition against a contempt order against plaintiffs' counsel for violating such stay, the orders of the bankruptcy court were in effect sustained in *In re Davis*, 730 F.2d 176 (5th Cir. 1984).

(g)

As we have earlier indicated, we have discussed at some length these proceedings in the Johns-Manville proceedings in New York and Louisiana, because, with their striking similarity both factually and on the legal issues to this case, the decisions of those courts provide persuasive guidance for our action herein. Though the district judge below did not cite the various rulings of the Manville courts in support of his decision, there was a close identity of issues between those in the *Manville*

cases and in the present case. In the three situations in which the defendants have challenged the injunction granted by the district judge [*i.e.*, the Mosa, Conrad and Piccinin cases], the only defendants other than the debtor, are the two Robins, Dr. Frederick A. Clark, Jr., Dr. Hugh J. Davis, and the debtor's insurer Aetna. So far as the suits against the two Robins and Dr. Clark, those defendants were entitled to indemnification by the debtor under the corporate by-laws and the statutes of Virginia, the State of debtor's incorporation,[13] and were, in addition, additional insureds under the debtor's insurance policy. Dr. Davis was the beneficiary of an express contract of indemnification on the part of Robins and was, under a compromise agreement with Robins and Aetna an additional insured under Robins' insurance policy. The Manville court had granted a preliminary injunction in favor of defendants in the same position as these defendants, as we have seen, on facts similar to those here, finding that the requirements of possible irreparable harm "had been satisfied by the showing . . . [that the suits against the defendants would represent] an immediate and irreparable impact on the pool of insurance assets, of the existence of sufficiently serious questions going to

---

[13] It is the accepted practice for corporations such as the debtor to indemnify their directors; officers and employees for the costs of their defense for any judgment rendered against them in such cases. *See A.D.M. Corp. v. Thorison*, 707 F.2d 25, 28 (1st Cir. 1983); 13 Fletcher, *Cyclopedia of the Law of Corporations*, § 6045.1 and 6045.3 (1980 ed.). Virginia, the State of the debtor's incorporation, has by statute empowered corporations of that State, by their charter, to provide for such indemnity. Section 13.1-3, 1 Virginia Code; Fletcher, *supra*, section 6045.2-235. The charter of the debtor, included in the record, provides such right of indemnification for the directors, officers and employees of the debtor in the broadest sense. As we have seen, a stay in favor of such officers, directors and employees, protected as they are by the right to indemnity from the debtor, and the record in this case shows undisputably that these directors and employees are so protected, was in order.

the merits," and of the tipping in the defendants' favor in the hardships in a balancing of the debtor's and the plaintiffs'. 33 B.R. at 262-63. That court had previously disposed of the public interest being weighted in the debtor's favor: "Indeed, this Court finds the goal of removing all obstacles to plan formulation eminently praiseworthy and supports every lawful effort to foster this goal while protecting the due process rights of all constituencies." 26 B.R. at 428.

II

The district court in this case applied the test for a grant of preliminary injunctive relief as stated by us in *Blackwelder Furniture*, 550 F.2d 189, 195 (4th Cir. 1977), and *Televest v. Bradshaw*, 618 F.2d 1029, 1032 (4th Cir. 1980). It found, as had the Johns-Manville courts, that irreparable harm would be suffered by the debtor and by the defendants since any of these suits against these co-defendants, if successful, would reduce and diminish the insurance fund or pool represented in Aetna's policy in favor of Robins and thereby affect the property of the debtor to the detriment of the debtor's creditors as a whole. The likelihood of success by the debtor under these circumstances appeared indisputable. The hardships which would be suffered irreparably by the debtor and by its creditors generally in permitting these plaintiffs to secure as it were a preference in the distribution of the insurance pool herein to which all creditors were entitled, together with the unquestioned public interest in promoting a viable reorganization of the debtor can be said to outweigh any contrary hardship to the plaintiffs. Such was the finding in the *Manville* cases and that finding does not appear unreasonable here.

The appellants, however, suggest that the record is insufficient to support such findings by the district judge. We disagree. The record is not extensive but it includes

every fact considered by the courts in the *Manville* cases to be necessary for their decision. The rights of Dr. Davis, Dr. Clark and the two Robins to indemnity and their status as additional insureds under Robins' insurance policy are undisputed on the record. That there are thousands of Dalkon Shield actions and claims pending is a fact established in the record and the limited fund available under Robins' insurance policy is recognized in the record. It seems incontestable that, if the suits are permitted to continue and discovery allowed, any effort at reorganization of the debtor will be frustrated, if not permanently thwarted. It is obvious from the record that if suits are permitted to proceed against indemnitees on claims on which the indemnitees are entitled to indemnity by Robins, either a binding judgment against the debtor will result or, as the court in *Metal Center* said, inconsistent judgments will result, calling for the exercise of the court's equitable powers. In our opinion, the record was thus more than adequate to support the district court's grant of injunctive relief. Certainly, the district court did not commit an abuse of discretion in granting the injunction herein.

The appellants add a final complaining note that the district judge stated in his decision that the "Conclusions of Law" made by him should apply "with equal force to all defendants similarly situated who are brought to the attention of the court." This is little different, however, from the language of the court in the *Manville* cases in which there was a broad, general injunction against all present or future suits.

In summary, we have no difficulty in sustaining the grant of a preliminary injunction herein. We are sustained in this conclusion by the fact, recognized by the district judge on the record, that any Dalkon Shield plaintiff may at any time petition for the vacation of the stay as it affects his or her suit and he or she is entitled to a hearing on such petition. Actually, there

is one such petition pending and the district judge has agreed to set a hearing on that petition.

III

The second appeal questions the validity of the district court's order of November 9, 1985, fixing the venue for the trial of all Dalkon Shield cases and providing for the transfer of such cases to the District Court of the Eastern District of Virginia at Richmond. Robins has challenged the appealability of such order. We find the challenge without merit.

It is unquestionably true that, as the Court in *In re Amatex Corp.*, 755 F.2d 1034, 1038-9 (3d Cir. 1985), declared, jurisdiction in a Court of Appeals to review a decision or order of a district court sitting in bankruptcy is controlled by § 1291, 28 U.S.C. *See also Matter of UNR Industries, Inc.*, 725 F.2d 1111, 1114-6 (7th Cir. 1984). While section 1291 limits jurisdiction to appeals from a (sic) "all final decisions of the district courts," the concept of finality under such statute has traditionally been applied "in a more pragmatic and less technical way in bankruptcy cases than in other situations." *Amatex, supra,* at 1039. Judge Breyer in *In re Saco Local Development Corp.*, 711 F.2d 441, 443-5 (1st Cir. 1983) has traced this traditional rule of more liberal construction of finality as applied to appeals in bankruptcy cases over the years. In tracing appealability under the statute in bankruptcy cases, Judge Breyer noted the definition of a "proceeding" in bankruptcy as stated in *Taylor v. Voss*, 271 U.S. 176, 181 (1926), as "not the overall liquidation or reorganization, but rather an individual 'matter[] of an administrative character . . . presented in the *ordinary course* of the administration of the bankrupt's estate." (Emphasis added by Judge Breyer.) He then declared on the basis of this determination that "any dispute between a bankrupt and his creditors over a claim or priority was a separate 'proceeding' and an or-

der settling such dispute was appealable." 711 F.2d at 445. Such is but another practical expression of the principle that "finality" under 1291 is to be given not an absolute and inflexible construction in bankruptcy cases in which a "functional" and "practical" application is to be the rule.

The special or unique reason for this relaxed rule of appealability in bankruptcy is that

> [b]ankruptcy cases frequently involve protracted proceedings with many parties participating. To avoid the waste of time and resources that might result from reviewing discrete portions of the action only after a plan of reorganization is approved, courts have permitted appellate review of orders that in other contexts might be considered interlocutory. *In re Amatex*, *supra*, at 1039.

This particular appeal illustrates well the justification for the relaxed rule of appealability in bankruptcy cases. Should appeal be denied and trials proceed in the district court of the myriad of claims involved with the possibility of reversal on appeal from a final decision in such proceedings, months and months of litigation, carried on at great expense to all concerned might be voided and the reorganization derailed, with consequent extensive delays both in reorganization and in resolution of the claims of the tort plaintiffs themselves. Weighty considerations of fairness and efficient judicial administration, therefore, mandate appealability in this case. We accordingly dismiss Robins' challenge to the appealability of the order in question.

Were it necessary, appealability could be sustained under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949), as well as in mandamus. *See In re Ralston Purina Co.*, 726 F.2d 1002, 1005 (4th Cir. 1984). We, however, prefer to ground our decision on the more relaxed standard of finality for appeal purposes under 1291 traditionally assigned bankruptcy appeals.

Turning to the merits of the appeal on this part of the case, we address first the power of the district court, sitting in bankruptcy, to enter an order fixing the venue for the trial of tort personal injury claims against the debtor and for transferring all such cases to the bankruptcy court for trial and disposition. Section 157(b)(5), 28 U.S.C. states:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

We do not understand the appellants to contend that under this language the district court did not have authority under this statute to issue an order fixing the venue for trial of tort cases against a Chapter 11 debtor. They do argue, however, that the sense of the section, if not its precise language, was to decentralize the trial of these tort claims and to permit their continuance for trial in the court in which the complaints were filed and that the ruling of the district judge in this case fixing venue in the district court in which the bankruptcy petition was filed flies in the face of this congressional purpose. They refer to the language of Senator Dole in commenting on the Senate Conference Report on the 1984 amendments and construe it as suggesting that tort claims were to be tried in the court in which those claims were originally filed. Senator Dole, in the language to which appellants refer and out of which the appellants arrive at their finding of the sense of the Congress, actually restated simply the language of the statute itself. He said that "where abstention does not occur,[14] those cases [*i.e.*, "personal injury

---

[14] "Mandatory abstention under section 1334(c)(2) is not applicable to personal injury claims, but the district court may abstain as a matter of discretion and lift the stay of the state court action." Taggart, *The New Bankruptcy Court System*, 59 American Bank. L.J. 231, 253 (1985).

cases"] will be handled by the district court where the bankruptcy has been filed or, if that court finds it appropriate, where the claim arose." Statement by Hon. Robert Dole 120 Cong. Rec. S8889 (daily ed. June 29, 1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 586, 587. We discern nothing in that language to warrant the conclusion that, in enacting the statute the Congress favored decentralizing the administration of the bankruptcy by leaving all "personal injury cases" to the court in the place where the claim "arose." In fact, to accept the view of the appellants on the construction of the statute would be completely at variance with the House version of the bill, which was in effect accepted by the Conference Committee, and would be to adopt the Senate version, which, according to Congressman Kastenmeier's statement as a House Conference member, was "largely reject[ed]" by the Conference Committee and "would have dissipated the assets of the estate by creating a multiplicity of forums for the adjudication of parts of a bankruptcy case." [15]

Nor do we find anything in *In re White Motor Credit*, 761 F.2d 270, 273-4 (6th Cir. 1985), also relied on by the appellants, that lends support to appellant's construction of § 157(b)(5). The extent of the holding in *White Motor* was that the district court had the power under the statute to allow products liability cases to be tried where the claim arose; there was nothing in the opinion, however, that declared that such action was mandated or even preferred. Specifically, there was no statement in the opinion that the district court in which the bankruptcy was pending could not try the claim. Unquestionably the district court in this case had the power under the statute to fix the trial venue in its district for all the Dalkon Shield cases.

The primary point of difference between the parties, however, relates not so much to the power of the district

---

[15] Statement by the Hon. Robert Kastenmeier, 130 Cong. Rec. H7492, *reprinted in* 1984 U.S. Code Cong. & Adm. News at 579.

court in this case to fix venue for all the pending Dalkon Shield tort cases—that power is stated in unmistakable terms in section 157(b)(5)—but to the manner in which that power may be exercised. Concededly, section 157(b)(5) does not prescribe any procedure. The appellants suggest that the procedure to be followed is laid out in 28 U.S.C. § 1412, which provides that "[a] district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." As the appellants correctly construe section 1412, the authority to transfer a suit under that statute rests solely with the court in which the suit is pending and it provides no authority whatsover to a district court sitting in bankruptcy in one district and having jurisdiction of the bankruptcy to transfer the venue of a case against the bankrupt to another district. Section 157(b)(5), however, expressly confers on the district court sitting in bankruptcy and having jurisdiction of the bankruptcy proceedings the power to fix the venue of any tort case against the debtor pending in other districts. The purpose of this latter statute was, as Congressman Kastenmeier declared, to centralize the administration of the estate and to eliminate the "multiplicity of forums for the adjudication of parts of a bankruptcy case." 130 Cong. Rec. H7492, June 29, 1984, *reprinted in* 1984 U.S. Code Cong. & Adm. News at 579. That purpose would be thwarted and the plain language of section 157(b)(5) nullified if the power of the district court sitting in bankruptcy to fix the venue for tort claims against a debtor was to be preempted by the provisions of section 1412. We do not believe this to have been the intention of Congress in enacting the two statutes. Section 157(b)(5) was drafted to cover the procedure in connection with a special group of cases, to wit, personal injury tort claims against a debtor in Chapter 11 proceedings wherever pending and in that connection the section is su-

preme. In all other cases related to the bankruptcy proceedings, however, the general statute (*i.e.*, section 1412) would govern. This, we think, is the proper construction to be given the two statutes. It is a construction which harmonizes the two sections. It conforms to that established canon of statutory construction that "[w]e must read the statutes [in those instances where there is any possible conflict] to give effect to each if we can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Columbia Gas v. Federal Energy Regulatory Comm.*, 651 F.2d 1146, 1158 (5th Cir. 1981); *Pennsylvania v. Dept. of Health & Human Resources*, 723 F.2d 1114, 1119 (3d Cir. 1983). To accept the appellants' interpretation and to negate the plain language of § 157(b)(5) "would violate the basic principle of construction that statutes should be read, if possible, as harmonious texts." *Leaf Tobacco Exporters Assn. v. Block*, 749 F.2d 1106, 1115 (4th Cir. 1984). We, therefore, have no difficulty in finding that the district judge's authority to fix venue of personal injury tort actions against the debtor exists under § 157(b)(5), irrespective of the district in which such controversy is pending.

And there are very real considerations that support a centralization of all the Dalkon Shield claims, *at least at first*, in the district court having jurisdiction of the bankruptcy. The "single focal point" of this proceeding is the development of a reasonable plan of reorganization for the debtor, one which will work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the Dalkon Shield claims. *See In re Towner v. Petroleum Co.*, 48 B.R. 182, 190 (W.D. Okla. 1985). These Dalkon Shield claims, asserted by thousands of individuals in courts throughout the United States on behalf of both citizens of this country and citizens or residents of other countries, represent what are characterized in the Act as "contingent or unliquidated claims." 11 U.S.C. § 502. Ordinarily such claims would be "esti-

mated" by the bankruptcy court as a "core proceeding," 28 U.S.C. § 157(b)(2), for purpose of allowance if failure to do so "would unduly delay the administration of the case." 11 U.S.C. § 502(c); 3 Collier on *Bankruptcy*, § 502.03 (15 ed. 1982). That duty of estimation in a proper case under section 502(c) is not a permissive one; it is a mandatory obligation of the bankruptcy court. *In re Nova Real Estate Inv. Trust*, 23 B.R. 62 (E.D. Va. 1982). This customary process of estimation of contingent claims is, however, different where the unliquidated, contingent claims are personal injury tort claims.

Section 157(b)(2)(B) excepts from the definition of "core proceedings" personal tort claims against the debtor. The bankruptcy court thus is without authority under the Act over "the liquidation or estimation of contingent or unliquidated personal injury or wrongful death claims against the estate for purposes of *distribution under* Title 11" 28 U.S.C. § 157(b)(2)(B). (Italices added). It will be observed, however, that the statute denies authority to the bankruptcy court to "estimate" contingent claims only if the purpose is to make a "distribution" of the assets of the debtor; the statute does not in express terms deny to the bankruptcy court the authority, or relieve it of the duty, to "estimate" the contingent "personal injury" claims for purposes of determining the feasibility of a reorganization. And such has been the construction of the statute which has been adopted by the courts which have had to face the issue, the two leading cases being proceedings arising out of the asbestos litigation. *Roberts v. Johns-Manville Corp.*, 45 B.R. 823, 825-26 (S.D.N.Y. 1984); *In re UNR Industries, Inc.*, 45 B.R. 322, 326-27 (N.D. Ill. 1984). Both of these cases hold that estimations of the debtors' potential personal injury tort liabilities as an incident of the development of a plan of reorganization are core proceedings within the bankruptcy court's jurisdiction and that

such estimations are not foreclosed by Section 157(b)(5) of the Act.[16]

This is not to say the personal injury claimants in this proceeding will not be ultimately entitled, if they elect to do so, to have a jury trial of their claim in the district court. Section 157(b)(5) gives them that right. But even though the tort claimants may be entitled to their jury trials, the bankruptcy court is not relieved of its duty in a Chapter 11 proceeding to estimate those contingent claims. The real question thus arises as to which proceedings takes precedence, whether the estimation by the bankruptcy court of the claims or the jury trials in the district court of the claims. The authorities which have considered this question in connection with a complicated products liability situation such as this are all unanimous. The estimations of the potential and pending claims by the bankruptcy courts should precede any trials of the claims. This was specifically held in the asbestos cases. *Roberts v. Johns-Manville Corp.*, 45 B.R. at 825-26. After all, the first and primary purpose of the proceedings, however, is to ascertain whether a fair

---

[16] *Roberts* at 826 said:

> Even assuming that section 157(b)(5) requires that all personal injury and wrongful death claims be tried in the district courts, the Court does not find that immediate withdrawal and liquidation of Roberts' claim is appropriate. Section 157(b)(2)(B) does not exclude from the definition of core proceedings estimations of personal injury and wrongful death claims for all purposes. The section is limited to estimation "for purposes of distribution." This leaves estimation for other purposes within the jurisdiction of the bankruptcy court. *See In re UNR Industries*, 45 B.R. 322 (N.D. Ill. 1984). A trial is not needed, therefore, to satisfy the requirement of section 502(c) that "all claims against the debtor be converted into dollar amounts." (Citing Congressional sources). Thus, even if the Code and the 1984 Act require that each and every asbestos claim filed in this eventually be tried, they do not require immediate withdrawal of those claims before a reorganiztaion plan has been confirmed.

reorganization of the debtor can be achieved. This purpose may well be completely thwarted if the energies of the debtor's executives and officers are initially diverted by, and the resources of the debtor are dissipated in the expenses of litigating, the trial of thousands of personal injury suits in courts throughout the land spread over an interminable period of time. As the Court in *Newton v. Johns-Manville Corp.*, 45 B.R. 827, 830 (S.D.N.Y. 1984), put it, in explaining its decision to proceed in the estimation of the claims before setting any claim for trial: there is no "sense in ordering a trial of a [tort claimant's] claim against Manville until a plan has been developed for Manville and until there is reason to believe that the time and expense of potentially 25,000 personal injury trials of the claims against Manville will not deplete the estate and leave other creditors with empty judgments."

There are 5,000 suits pending against the debtor in this proceeding. There are perhaps an equal number not filed. If all these claims were to be tried, the expense of discovery proceedings and trial would likely consume all the assets of the debtor and exhaust all the resources of its executives and employees. As one court has commented, we "must be mindful of the realities of modern litigation. Pre-trial discovery under modern federal practice has become a monster on the loose . . . . Pretrial proceedings have become more costly and important than trials themselves." *In re Johns-Manville, supra*, 40 B.R. at 224. Since the Dalkon Shield litigation began, forty claims have actually been tried but over $517,000,000 have been expended in defending or settling Dalkon Shield suits or claims. It is impossible to anticipate the stupendous costs that would be involved if all the claims here had to be tried. If the claimants as a whole are to realize reasonable compensation for their claims, it is obviously in the interest of the class of claimants as a whole to obviate the tremendous expense of trying these cases

separately. If the bankruptcy court could arrive at a fair estimation of the value of all the claims and submit a fair plan of reorganization based on such estimation, with some mechanism for dispute resolution and acceptable to all interested parties, great benefit to all the claimants could be achieved and the excessive expense of innumerable trials, stretching over an interminable time, could be avoided.[17] In addition, the real purpose of the proceeding (*i.e.*, a reorganization of the debtor and its continuance as a going business) could be attained.

It is manifest, of course, that the process of estimation will involve some examination of the claims. But this examination will be conducted by the court, will likely not involve duplicative discovery, and can be accomplished expeditiously. It was argued in *In re UNR Industries, Inc.*, 45 B.R. 322 (N.D. Ill. 1984), though, that this would require a hearing by the bankruptcy court in making its estimation of the tort claims and accordingly would "not be any more efficient than ordering district court trials." The court dismissed the argument with this apt comment:

> This contention both understates the time and expense of trials and overstates the time and expense of the estimation process. Even should Judge Toles decide the Towers study is insufficient to accurately estimate asbestos claims and that some sort of hearing is necessary, there is no reason to believe 17,000 hearings must be held to get an accurate enough picture of the debtor's liability to asbestos victims. 45 B.R. at 326.

---

[17] Section 157(b)(5) "does not mandate that all tort actions must be tried in district court, but only those which are not settled otherwise. . . ." Bankruptcy Service, L.Ed. § 2:14.5, at 22 (Supp. 1985) (summarizing *Roberts v. Johns-Manville, supra*, 45 B.R. at 825-26), and "the parties are certainly free to agree to a dispute-resolution procedure that does not involve trial," *UNR, supra*, 45 B.R. at 326. To the same effect is *Newton v. Johns-Manville Corp.*, 45 B.R. 827, 830 (S.D.N.Y. 1984).

That language is applicable in this case. It is unlikely that all 8,000 to 10,000 claims which have been filed would have to be tried before an intelligent estimation of the claims could be made by the bankruptcy court. The interests of all the claimants and the public interest in a reasonable and fair reorganization combine in favor of an effort at an estimation of the Dalkon Shield claims as a basis for formulating such a plan of reorganization and as a possible step in working out a mechanism acceptable to all the claimants for a dispute-resolution of their claims without burdening the estate with the tremendous expense of endless litigation and reducing if not exhausting, the assets available for paying those claims.

No progress along estimating these contingent claims, however, can be made until all Dalkon Shield claims and suits are centralized before a single forum where all interests can be heard and in which the interests of all claimants with one another may be harmonized. *Cf. Fidelity Mortage Investors v. Camelia Builders, Inc.*, 550 F.2d 47, 55 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093. That undoubtedly was the purpose of the motion to fix venue and to transfer the pending suits to the district court sitting in bankruptcy before which the proceedings were pending. This unquestionably was the idea which prompted the district court to opt tentatively in his order fixing venue in the district court sitting in bankruptcy for all these claims. We approve of the idea and find it conducive of the interests of all concerned.

However persuasive may be the reasons for fixing temporarily at least venue of all the pending suits against the debtor in the district court sitting in bankruptcy where all the other Dalkon Shield claims not in suit may be handled together, the question remains as to what procedure must be followed in effecting such change of venue in order to satisfy the requirements of due process. It is the position of the appellants that a right of action in tort is "property" which may not under due process

be adversely affected by an involuntary change of venue in the absence of a full hearing after reasonable notice. It may be accepted that, as the appellants argue, a tort claims or action is a "species of property" in the constitutional sense. *Logan v. Timmerman Brush Co.*, 455 U.S. 422, 428 (1982); *cf. Martinez v. California*, 444 U.S. 277, 281-82 (1980). Similarly, it may be agreed that where the plaintiff has such a claim against a debtor in a Chapter 11 proceeding, he has a statutory right to a jury trial in a district court and that the place of such trial is an important right which may be entitled to some form of due process protection under the broad principles of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The question is, though, what form such protection must take.

"Due process" does not establish an inflexible standard to be rigorously applied in all cases. Recently, in *McClelland v. Massinga*, —— F.2d —— (4th Cir. 1986), we said that "due process is not 'a technical conception' of 'inflexible procedures' (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) nor is it 'a mechanical instrument' or 'yardstick'; it is rather 'a delicate process of adjustment' and of a balancing of interests in which it is recognized 'that what is unfair in one situation may be fair in another . . . .'" In particular, it is important to recognize that the notice and hearing is not "*always* require[d] . . . prior to the initial deprivation of property" and that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." *Parratt v. Taylor*, 451 U.S. 527, 540 (1981). We conclude, therefore, that due process requires some form of notice and opportunity for a hearing before there can be a change of venue and before trial of a personal injury tort cause of action against a debtor may be transferred *finally* from the court in which the cause was initially

filed to the district where the bankruptcy proceedings are pending.

We reach this conclusion not only under due process analysis, but also under the language and Rules issued under the Bankruptcy Act. In our opinion, the debtor's motion herein qualified as a "contested matter" under the Act. As such it had to be begun by the filing of a motion with "reasonable notice and opportunity for hearing . . . afforded the party against whom [the] relief [was] sought." Bankruptcy Rule 9014. The debtor filed with the district court sitting in bankruptcy an appropriate motion for a fixing of venue and for transfer of tort claims against the debtor, and notice in the manner provided by the Rules in this case was given but only to the Committee of Representatives of Dalkon Shield claimants. There was no notice given the individual Dalkon Shield claimants who had causes of action against the debtor pending in court. Counsel for the debtor asserted in argument in district court in justification of failure to serve the individual plaintiffs in the tort actions that "in these cases the traditional rule is that you serve the counsel for the Committee, and the Committee, the counsel then has the obligation to bring such matters as are appropriate to the attention of the members of the Committee." Counsel cited no authority for this "traditional rule." The Committee, however, contends that notice to it was not notice to the individual claimants and that such notice did not satisfy the notice requirements of Bankruptcy Rule 9014 or of due process.

The role of Committees appointed under the Act as revised has received considerable discussion but remains somewhat uncertain. As we have already noted, the status and position of Chapter 11 Committees are thoroughly canvassed in Andrews, *The Chapter 11 Creditors' Committee: Statutory Watchdog?*, 2 Bankruptcy Developments Journal, 247 (1985). As that article indicates, the Committee's right to intervene and be heard in any pro-

ceeding is, we think, fairly established. *Matter of Marin Motor Oil, Inc.*, 689 F.2d 445, 454-6 (3d Cir.), *cert. denied*, 459 U.S. 1206 (1983). In fact, the Rules requires that certain notices in the course of the proceedings must be given the Committee. But it seems clear under the Rules that the Committee is not authorized to represent the individual interests of any claimant, as distinguished from the general interests of all claimants, *In re Johns-Manville*, 26 B.R. 919, 926 (S.D.N.Y. 1983), and only in certain specific situations, no one of which is relevant here, may proper service be made on the Committee rather than on the individual claimants themselves under Bankruptcy Rule 2002(i). It follows that, in our opinion, service of notice of the hearing on the motion to fix venue and to transfer, as given only to the Committee did not represent compliance with Bankruptcy Rule 9014 or with due process.

Conceding that notice to the Committee did not qualify as service on the individual claimants, it does not follow that the absence of such notice may be fatal to due process in this proceeding. The notice to the Committee may have been sufficient under *Cleveland Bd. of Education v. Loudermill*, —— U.S. ——, 84 L.Ed.2d 494, 506 (1984), to permit the issuance of a provisional or conditional order providing for a fixing of venue in the district court sitting in bankruptcy for all the pending Dalkon Shield cases against the debtor *but giving the claimants individual notice and an opportunity to object and to be heard before the order became final in any case where the plaintiff has filed an objection.* That procedure would satisfy due process under *Parratt* and the other cases. And, as we read the record as well as the formal order of the district court, this is precisely what the district court intended, though the language of its order may be obscure on the point.

The district court entered a ruling bringing for the time being all the pending suits against the debtor before

the district court sitting in bankruptcy in order to proceed expeditiously in the reorganization but with the definite condition that any party might object and might petition for abstention in his or her case. It was in our opinion intended as a conditional order, though not clearly stated as such. We are of the opinion, because of this possible want of clarity in the order assailed, that such order must be modified to make it crystal clear that the determination of venue therein is, as we have said, conditional, dependent finally and ultimately on a ruling to be made only after notice to all claimants advising them of their right to enter any objections they may have to such a tentative ruling and to submit a motion for abstention in their particular case.[18] The notice to be given all claimants could be in the form of a letter both to the claimant and to his or her attorney stating the conditional ruling made subject to a final hearing, to become final only after reasonable opportunity given all claimants to object and/or to seek abstention. We would think the notice should fix a time limit for the filing of objections by claimants and should fix a day for a hearing on the objections. The tentative order might be made final as to any claimant who failed to enter an objection within the prescribed time. The mailing of the notice as required will not involve any great expense. Such a modification of the order, followed by a notice in the form suggested, it would seem, should satisfy the requirements of due process and of the Bankruptcy Rules in the unusual circumstances of this case. In order to achieve this modification in the order of the district judge, this phase of the appeal is remanded to the district court for further proceedings in accordance with the opinion herein.

---

[18] Until the conditional order is made final with regard to a particular case, a case should not be physically transferred. Thus, no filing fee shall be paid under Rule 9027 or expenditures accompanying photocopying, freight, etc. be made. Only after an order is final shall the expense of transfer be necessary.

We do not presume to suggest rigid guidelines for the district judge to follow when considering objections to the transfer. We believe it important, however, to observe that although there may be distinct advantages of the tort claims being transferred to Richmond, those advantages should be balanced against the disadvantages that may be advanced at the hearing. In that regard, some cases may be fully prepared and ready for state trial. Some cases may require substantial numbers of local witnesses. Claimants may be receiving critical medical, physical or psychological care in a local area which would have to be halted or transferred to Richmond. All of these factors are relevant. Moreover, there are issues of state law that may substantially affect the results in individual cases.

In summary, we affirm the district court's order staying the suits of the plaintiffs against the debtor and all co-defendants, but remand with directions the order fixing venue for all pending suits against the debtor and transferring the suits to the district court before which the bankruptcy proceedings were pending.

AFFIRMED IN PART
and
REMANDED WITH DIRECTIONS.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

Case No. 85-01307-R

Retained Proceeding
(Judge Merhige)

IN RE A. H. ROBINS COMPANY, INCORPORATED,
Debtor.

EMPLOYER'S TAX IDENTIFICATION
No. 54-0486348

[Filed Nov. 9, 1985]

ORDER PURSUANT TO
28 U.S.C. SECTIONS 157(b)(5) AND 1334(b)
AND 11 U.S.C. SECTION 105(a)

Upon the motion of A. H. Robins Company, Incorporated ("Robins"), for orders pursuant to 28 U.S.C. Sections 157(b)(5) and 1334(b), and 11 U.S.C. Section 105(a) for determination of trial venue, identification of cases "related to" this Chapter 11 case and transfer of cases; the Court having considered the motion, the memorandum of law, the Statement of Financial Affairs For Debtor Engaged in Business Question 12 (Exhibit 1), and having heard the arguments of counsel and good cause appearing therefor, it is hereby

ORDERED, pursuant to Sections 157(b)(5) and 1334(b) of Title 28 of the United States Code, that to the extent personal injury tort or wrongful death actions against Robins or any other defendant that are related to the Robins Chapter 11 case are to be tried in a district

court, such action shall be tried in the Richmond Division of the United States District Court for the Eastern District of Virginia; and it is further

ORDERED, pursuant to Section 1334(b) of Title 28 of the United States Code, that all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield intrauterine contraceptive device are proceedings related to this Chapter 11 case over which this Court has jurisdiction; and it is further

ORDERED that all actions related to the Robins Chapter 11 case, as determined by this Order, now pending in any federal district court or subsequently removed to any federal district court during the pendency of this Chapter 11 case, be transferred by the Clerks of those Courts to this Court; and it is further

ORDERED that nothing contained herein shall affect or limit the power of this Court to abstain from hearing any particular proceeding under Section 1334(c)(1) of the United States Code or remanding any particular proceeding under Section 1452(b) of the United States Code.

/s/ Robert R. Merhige, Jr.
United States District Judge

DATED: November 9, 1985

We ask for this:

/s/ Clifford W. Perrin, Jr.
William R. Cogar
Clifford W. Perrin, Jr.
Mays, Valentine, Davenport & Moore
Post Office Box 1122
Richmond, Virginia 23208

Patrick A. Murphy
Penn Ayers Butler
Murphy, Weir & Butler
101 California Street, 39th Floor
San Francisco, California 94111

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

IN RE: A. H. ROBINS

CHAPTER 11

November 9, 1985

Richmond, Virginia

Before: HONORABLE ROBERT R. MERHIGE, JR.,
United States District Judge
HONORABLE BLACKWELL N. SHELLEY,
United States Bankruptcy Judge

EXCERPT OF PROCEEDINGS

(DISTRICT COURT'S BENCH RULING)

* * * *

THE COURT: Well, gentleman, I have got to rule on it. There isn't any need to delay it.

These cases, if they don't get settled—under the whole theory of bankruptcy all of the cases ought to be at the same place, whether it is here or Elkins, West Virginia. But under the auspices of the bankruptcy court. I am going to enter the order, Mr. Butler, as you have asked for. But I do want you to get with them to give instructions to your attorneys in the way we want the files sent here, because it can save us a lot of time and trouble.

MR BUTLER: I understand. The order will be as submitted—

THE COURT: As of today, right now. It is entered.

Now, there was another matter where a gentleman wanted to get away.

MR. DOLBEARE: Excuse me, Your Honor, on behalf of the Piccinin we ask the court to stay the order as just entered to permit us to appeal this order to the fourth circuit. We also ask this court to certify that question as one of significant doubt and one of which we have no precedent on.

THE COURT: I will stay it for ten days.

MR. DOLBEARE: Thank you.

You will not certify?

THE COURT: No.

MR. BUTLER: Your Honor, if you have stayed this order, I think I may have to make at this time an oral motion on the 9027 removal period. Time marches on whether we want it to or not.

THE COURT: Are we that close?

MR. BUTLER: 19th of November is what I am told.

THE COURT: Suppose I just stay it for five days. They have circuit judges here all the time.

MR. BUTLER: Five days would certainly leave us the—we would not have to request the extension.

THE COURT: I amend that to a five-day stay.

MR. BUTLER: Thank you very much.

* * * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

April 10, 1986

TO:

Murray Drabkin
Mark C. Ellenberg
C. Neal Pope
Robert L. Dolbeare
Patrick A. Murphy
Penn Ayers Butler
W. Scott Street, III
Jan Z. Krasnowiecki
H. Robert Erwin, Jr.
L. B. Cann, III
George B. Little
Clifford W. Perrin, Jr.
William R. Cogar
Bradfute W. Davenport, Jr.
James S. Crockett, Jr.

NOTICE OF JUDGMENT

Judgement was entered in Case Nos. 85-2183(L), 85-2184, 85-2185, 85-2186 this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time

A petition must be *received in the Clerk's Office* within 14 days after the judgment date set forth above. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

Statement of Counsel

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose" section. The points to be raised shall be succinctly listed in the statment. Lacking such a statement, the petition will be returned to counsel without filing.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time

The mandate is issued 21 days after judgment. A *timely* petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

JOHN M. GREACEN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2183(L)

A. H. ROBINS COMPANY, INC.,
Appellee,

versus

ANNA PICCININ,
Appellant.

and

NANCY CAMPBELL, *et al,*
Defendants.

AETNA CASUALTY AND SURETY COMPANY,
Intervenor/Appellee.

No. 85-2184

A. H. ROBINS COMPANY, INC.,
Debtor.

A. H. ROBINS COMPANY, INC.,
Appellee,

versus

COMMITTEE REPRESENTATIVES OF
DALKON SHIELD CLAIMANTS,
Appellants.

AETNA CASUALTY AND SURETY COMPANY,
Intervenor/Appellee.

No. 85-2185

A. H. ROBINS COMPANY, INC.,
Debtor.

A. H. ROBINS COMPANY, INC.,
Appellee,

versus

KATHRYN CONRAD, LUISA AND JACK MOSA,
Appellants.

No. 85-2186

IN RE: A. H. ROBINS COMPANY, INC.,
Debtor.

A. H. ROBINS COMPANY, INC.,
Appellee,

versus

ANNA PICCININ,
Appellant.

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond
Robert R. Merhige, District Judge

[Filed May 14, 1986]

Upon consideration of the petition of appellant Piccinin for rehearing;

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Russell, with the concurrence of Judge Chapman and Judge Swygert, Senior U.S. Circuit Judge sitting by designation.

For the Court,

/s/ John M. Greacen
Clerk

Supreme Court, U.S.
FILED
SEP 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-216

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

COMMITTEE OF REPRESENTATIVES OF DALKON SHIELD CLAIMANTS,

Petitioner,

v.

A.H. ROBINS COMPANY, INCORPORATED, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT AETNA CASUALTY & SURETY COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

John G. Harkins, Jr.*
Jan Z. Krasnowiecki
Edmund B. Spaeth, Jr.
James M. Beck
PEPPER, HAMILTON & SCHEETZ
2001 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109-1083
(215) 893-3000
Attorneys for Respondent Aetna Casualty & Surety Company

*Counsel of record for Respondent Aetna Casualty & Surety Company upon whom service is to be made

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTION PRESENTED

This is a bankruptcy case in which there are now pending some 300,000 claims by persons who allege they were injured by the debtor's product, the Dalkon Shield intrauterine contraceptive device. When the bankruptcy petition was filed, approximately 5,000 of these claims were also pending in various federal and state court actions. About half of these actions named other defendants besides the debtor, including some that named respondent Aetna Casualty & Surety Company ("Aetna"), an insurer of the debtor. The question presented is:

Did the District Court, acting as a bankruptcy court, properly determine that claims pending against Aetna were "related to" the bankruptcy and should be transferred to its jurisdiction from the various courts in which they had originally been filed?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CASES AND AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR REFUSING THE PETITION	3
1. The Petition Seeks Review Of A Question Which Is Devoid Of Any Practical Effect	3
2. The District Court Has Not Abused Its Discretion In Temporarily And Conditionally Transferring All Dalkon Shield Claims To The Eastern District Of Virginia	4
CONCLUSION	7
APPENDIX	A-1
Appendix A: Statutes Involved	A-1
Appendix B:	A-2
In re A.H. Robins Co., No. 85-01307-R, Order For Preliminary Injunction (E.D. Va. Oct. 11, 1985)	A-2
In re A.H. Robins Co., Nos. 85-01307-R, 85-1006-R, Order Pursuant To 28 U.S.C. Sections 157(b)(5) And 1334(b) And 11 U.S.C. Section 105(a) (E.D. Va. Nov. 9, 1985)	A-9
A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986)	A-11
Breland v. Aetna Casualty & Surety Co., No. 86-0315-R, Initial Pretrial Order (E.D. Va. Jul. 9, 1985)	A-52
Appendix C: Listing Of Corporate Affiliations Prescribed by Rule 28.1 Of The Rules Of The Supreme Court Of The United States	A-53

TABLE OF CASES AND AUTHORITIES

Cases: Page

A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986) 2, 3, 4, 6

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) 4

In re White Motor Credit, 761 F.2d 270 (6th Cir. 1985) .. 5

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 2

Piccinin v. A.H. Robins Co., October Term, 1986, No. 86-211 (U.S.) 3, 5

Rice v. Sioux City Cemetery, Inc., 349 U.S. 70 (1955) ... 4

Statutes, Rules and Regulations

11 U.S.C. §105(a) 2

28 U.S.C. §157(b)(5) 2, 4, 5

28 U.S.C. §1334(d) 2

No. 86-216

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

COMMITTEE OF REPRESENTATIVES OF
DALKON SHIELD CLAIMANTS,

Petitioner,

v.

A.H. ROBINS COMPANY, INCORPORATED, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT AETNA CASUALTY & SURETY COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case arises from a Chapter 11 bankruptcy petition filed in August 1985 by A.H. Robins Company, Incorporated ("Robins"). The petition was Robins' response to what the Court of Appeals accurately described as "an avalanche of actions filed in various state and federal courts throughout the United States by citizens of this country as well as of foreign countries seeking damages for injuries allegedly sustained by the use of an intrauterine contraceptive device known as a Dalkon Shield," which was manufactured by Robins. *A.H. Robins Co. v.*

Piccinin, 788 F.2d 994, 996 (4th Cir. 1986) (A.12-51). By the time Robins filed for protection, over $500 million had been spent in defending and settling thousands of such actions. *Id.* at 996 n.4 (A.14). Petitioner, the Committee of Representatives of Dalkon Shield Claimants ("Committee"), is an official committee appointed by the bankruptcy trustee to represent the interests of those who have personal injury tort claims against Robins arising from the sale or use of the Dalkon Shield.

Robins is not the only defendant named in many of the actions; plaintiffs have named other defendants, including Robins' liability insurer, respondent Aetna Casualty & Surety Company ("Aetna"). After Robins filed its petition, plaintiffs in a number of the multi-defendant actions sought to sever Robins and proceed solely against the remaining defendant(s). In response, Robins began an adversary proceeding in the United States District Court for the Eastern District of Virginia, the district where the Robins bankruptcy case is pending. Robins sought (1) declaratory relief adjudging Aetna's liability policy to be an asset of Robins' estate in which all Dalkon Shield claimants had an interest, and (2) injunctive relief staying the prosecution of actions against non-debtor co-defendants, such as Aetna. Aetna intervened in the proceeding as a party plaintiff, and the Committee intervened as a party defendant.

After a hearing, the District Court, Judge Robert R. Merhige, Jr. presiding,[1] granted both the requested declaratory relief and the stay by Order dated October 11, 1985 (A.2-8). Neither of these actions was challenged by the Committee on appeal. On November 9, 1985, the District Court entered the order that is the subject of this petition. The District Court, by Order Pursuant to 28 U.S.C. Sections 157(b)(5) And 1334(b) And 11 U.S.C. Section 105(a) (A.9-10), found that Dalkon Shield claims were "related to" the Robins Chapter 11 proceeding and directed that such claims be transferred to the Eastern District

1. Judge Merhige, an Article III judge, conducted the hearing exercising his bankruptcy powers in order to avoid the jurisdictional obstacles that would have confronted a bankruptcy judge in ruling on state law tort claims. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (plurality opinion).

of Virginia and there assigned for pretrial proceedings and possible trials. Order, para. 1-3 (A.9-10). The District Court's Order was expressly temporary and conditional. The court carefully provided that nothing in its Order affected its power "to abstain from hearing . . . or remanding any particular proceedings." *Id.*, para. 4 (A.10).

It is only the District Court's Order of November 9, 1985 that the Committee appealed to the Court of Appeals for the Fourth Circuit. The facts of the case, the decision by the Court of Appeals and the further proceedings that have taken place before the District Court are fully described in Aetna's brief in opposition to the petition for certiorari in *Piccinin v. A.H. Robins Co.*, October Term, 1986, No. 86-211 (U.S.), which Aetna incorporates herein by reference, except that only those facts relevant to the District Court's November 9, 1985 Order are pertinent to this petition.

REASONS FOR REFUSING THE PETITION

This case presents no occasion for the issuance of a writ of certiorari for the reasons fully set forth by the District Court, by the Court of Appeals for the Fourth Circuit, and in Aetna's brief in opposition to the *Piccinin* certiorari petition, October Term, 1986, No. 86-211. Rather than repeat arguments made in opposition to the *Piccinin* petition, Aetna incorporates its brief in *Piccinin* by reference, and will limit its arguments here to features peculiar to the Committee's petition.

1. The Petition Seeks Review Of A Question Which Is Devoid Of Any Practical Effect.

By its petition, the Committee is seeking to have this Court answer an abstract legal question, which would have no impact on the course of this proceeding. As noted, the District Court entered two separate orders. The first Order, entered October 11, 1985, stayed all proceedings in all Dalkon Shield cases throughout the country, including those against Aetna (A.7). The Committee did not appeal this stay. *A.H. Robins*, *supra*, 788 F.2d at 997 (A.16). Rather, the Committee appealed only from

the District Court's second Order, entered November 9, 1985, transferring Dalkon Shield claims to the Eastern District of Virginia. *Id.* at 998 (A.17).

The Committee's petition is therefore untenable. By failing to appeal the District Court's Order of October 11, 1985, the Committee has assented to all proceedings being stayed.[2] Given that all proceedings are stayed, this petition presents a purely theoretical issue, for whether a stayed proceeding is docketed in California, Virginia or anywhere else is of no practical effect. Wherever the proceeding is, it will not go forward until the stay is lifted. This Court "does not sit to satisfy a scholarly interest" in abstract questions simply because they "may present an intellectually interesting . . . problem." *Rice v. Sioux City Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (dismissing certiorari as improvidently granted).

2. The District Court Has Not Abused Its Discretion In Temporarily And Conditionally Transferring All Dalkon Shield Claims To The Eastern District Of Virginia.

The Committee does not now contend, and did not contend before the Court of Appeals,[3] that the District Court lacked the statutory authority to issue its Order of November 9, 1985, transferring all Dalkon Shield claims, including those against Aetna, to the Eastern District of Virginia. In any event, the contention would be incorrect, for such authority is expressly conferred upon the District Court:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined

2. As the Committee did not appeal the stay, its contention that the stay denies claimants their right to a jury trial has been waived, and is not properly before this Court. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 n.5 (1980).

3. *See* 788 F.2d at 1010 ("We do not understand the appellants to contend that under [28 U.S.C. §157(b)(5)] the district court did not have authority under this statute to issue an order fixing the venue.") (A.39).

> by the district court in which the bankruptcy case is pending.

28 U.S.C. §157(b)(5).[4] The Committee's only contention is that the District Court should not have transferred such cases to itself, but instead should have exercised its admitted discretion in favor of transferring them to the district courts throughout the nation in which the claims arose. This contention has no merit.

According to the Committee, 28 U.S.C. §157(b)(5) "manifestly is designed to decentralize the adjudication of personal injury claims." Petition at 7. Nothing in 28 U.S.C. §157(b)(5) itself manifests such a design. To the contrary, the section expressly gives a district court the power to select venue without stating any preference for centralization or decentralization.

There being no basis for the Committee's argument in the language of the statute, the Committee purports to find support for decentralization of claims from the legislative history of §157(b)(5) and from *In re White Motor Credit*, 761 F.2d 270 (6th Cir. 1985). The Court of Appeals has analyzed and rejected the Committee's arguments so fully that no further comment is needed:

> [Appellants] argue, however, that the sense of the section, if not its precise language, was to decentralize the trial of these tort claims and to permit their continuance for trial in the court in which the complaints were filed and that the ruling of the district judge in this case fixing venue in the district court in which the bankruptcy petition was filed flies in the face of this congressional purpose. They refer to the language of Senator Dole in commenting on the Senate Conference Report on the 1984 amendments and construe it as suggesting that tort claims were to be tried in the court in which those claims were originally filed. Senator Dole, in the language to which appellants refer and out of which the appellants arrive at their finding of the sense of the Congress, actually restated simply the language of the statute

4. Aetna has addressed the authority of the District Court in an action "related to" a bankruptcy action at length in opposition to the *Piccinin* certiorari petition, Oct. Term, 1986, No. 86-211.

itself. He said that "where abstention does not occur, those cases [i.e., "personal injury cases"] will be handled by the district court where the bankruptcy has been filed or, if that court finds it appropriate, where the claim arose." Statement by Hon. Robert Dole 130 Cong. Rec. S. 8889 (daily ed. June 29, 1984), *reprinted in*, 1984 U.S. Code Cong. & Ad. News 586, 587. We discern nothing in that language to warrant the conclusion that, in enacting the statute the Congress favored decentralizing the administration of the bankruptcy by leaving all "personal injury cases" to the court in the place where the claim "arose." In fact, to accept the view of the appellants on the construction of the statute would be completely at variance with the House version of the bill, which was in effect accepted by the Conference Committee, and would be to adopt the Senate version, which, according to Congressman Kastenmeier's statement as a House Conference member, was "largely reject[ed]" by the Conference Committee and "would have dissipated the assets of the estate by creating a multiplicity of forums for the adjudication of parts of a bankruptcy case."

Nor do we find anything in *In re White Motor Credit*, 761 F.2d 270, 273-74 (6th Cir. 1985), also relied on by the appellants, that lends support to appellant's construction of §157(b)(5). The extent of the holding in *White Motor* was that the district court had the power under the statute to allow products liability cases to be tried where the claim arose; there was nothing in the opinion, however, that declared that such action was mandated or even preferred. Specifically, there was no statement in the opinion that the district court in which the bankruptcy was pending could not try the claim. Unquestionably the district court in this case had the power under the statute to fix the trial venue in its district for all the Dalkon Shield cases.

788 F.2d at 1010 (footnotes omitted) (A.39-40). It is therefore clear, not only that the District Court did not abuse its discretion, but that it exercised its discretion in a proper and judicious manner, as was found by the Court of Appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN G. HARKINS, JR.*
JAN Z. KRASNOWIECKI
EDMUND B. SPAETH, JR.
JAMES M. BECK
Pepper, Hamilton & Scheetz
2001 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109-1083
(215) 893-3000

Attorneys for Respondent
AETNA CASUALTY & SURETY COMPANY

*Counsel of record for Respondent Aetna Casualty & Surety Company upon whom service is to be made

APPENDIX

APPENDIX

APPENDIX A

STATUTES INVOLVED

11 U.S.C. §105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

11 U.S.C. §541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

28 U.S.C. §157. Procedures

(b)(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. §1334. Bankruptcy cases and proceedings

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

APPENDIX B

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re:	) Chapter 11
A. H. ROBINS COMPANY, INCORPORATED,	) Case No. 85-01307-R
Debtor.	)
Employer's Tax Identification No. 54-0486348	)
	)
A. H. ROBINS COMPANY, INCORPORATED,	) Adversary Proceeding) No. 85-1006-R
Plaintiff,	)
v.	)
NANCY CAMPBELL, KATHRYN CONRAD, JEANETTE DICHARRY and VERNON DICHARRY, ANNA PICCININ, LUISA MOSA and JACK MOSA, STELLA J. CAMP and JOHN H. CAMP, HELEN BARNETT and MICHAEL BARNETT, and EDNA LINDSEY RUMINSKI,	) (Retained Proceeding)
Defendants.	)

ORDER FOR PRELIMINARY INJUNCTION

This cause came on to be heard on plaintiff's motion for preliminary injunction. The Court having considered plaintiff's complaint, the memorandum of law and the declarations in support of the motion and the papers filed in opposition thereto and, having heard testimony and argument and considered the evidence presented, the Court adopts its remarks and rulings as

stated from the bench and makes the following findings of fact, conclusions of law, and order for a preliminary injunction pursuant to Bankruptcy Rule 7065 and Federal Rule of Civil Procedure 65(d), all objections by opposing counsel being duly preserved:

Findings of Fact

As of August 21, 1985, the plaintiff in this action, A. H. Robins Company, Incorporated ("Robins") was named as the defendant in approximately 5,000 civil actions in state and federal courts throughout the country alleging injuries and seeking damages stemming from Robins' manufacture and marketing of the Dalkon Shield intrauterine contraceptive device. Pursuant to 11 U.S.C. Section 362(a), all litigation against Robins in those approximately 5,000 civil actions was stayed automatically on August 21, 1985 upon filing of Robins' petition for protection from its creditors under Chapter 11.

Approximately 2,400 of those civil actions name persons or entities other than Robins as co-defendants. Those approximately 2,400 civil actions seek damages from Robins co-defendants based upon theories of liability which are derivative of or interrelated with the causes of action or claims for relief asserted against Robins. Any judgment rendered against a Robins co-defendant in any one of those approximately 2,400 civil actions could result in a claim against Robins for either contractual indemnity or commonlaw contribution. Although Robins may be entitled to relitigate the issue of its liability to each indemnity or contribution claim, the burden on Robins' estate of such litigation would significantly impede Robins' reorganization and render any plan of reorganization futile.

Moreover, many of those 2,400 civil actions against the co-defendants would require the participation of Robins' officers, executives and employees as witnesses and in pre-trial and post-trial proceedings. The diversion of Robins' key personnel from the reorganization effort which would result from continuation of litigation in those 2,400 civil actions would impair Robins' reorganization effort and would be contrary to the public interest.

The continuation of litigation in those 2,400 civil actions which name Robins' co-defendants poses a significant threat to Robins' reorganization effort and could cause a direct and substantial drain upon the assets of Robins' Chapter 11 estate. If this relief sought is not granted, a rush to judgment will likely ensue. Such a race to obtain judgments against Robins' co-defendants would be detrimental to the debtor and would adversely affect Robins' reorganization effort.

Any rejection by the debtor of its contractual duty to indemnify its officers, directors, and employees would adversely affect the debtor and would not be consistent with the debtor's reorganization under Chapter 11.

Defendant Nancy Campbell has a civil action pending in the United States District Court for The Western District of Wisconsin. In her complaint Ms. Campbell asserts claims against Robins, The Aetna Casualty and Surety Company, E. Claiborne Robins, Sr., E. Claiborne Robins, Jr. and Dr. Hugh J. Davis. Ms. Campbell seeks recovery from those defendants under theories of negligence, strict liability, implied and express warranties, misrepresentation, fraud and under the Racketeer Influcenced and Corrupt Organization Act ("RICO"). The continuation of litigation in the Campbell Action against any of Robins' co-defendants threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendant Kathryn Conrad has a civil action pending in the Circuit Court for Baltimore City. In her complaint, Ms. Conrad asserts claims against Robins, Dr. Hugh J. Davis and Dr. Frederick A. Clark, Jr. Ms. Conrad seeks recovery from those defendants under theories of negligence, strict liability, fraudulent misrepresentation and conspiracy. The continuation of litigation in the Conrad action against any of Robins' co-defendants threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendants Jeanette Dicharry and Vernon Dicharry have a civil action pending in The United States District Court for the Eastern District of Louisiana. In their complaint, the Dicharrys assert claims against Robins and Aetna Casualty and Surety

Company (served herein as Aetna Life and Casualty). The Dicharrys seek recovery from those defendants under theories of strict liability, negligence, misrepresentation and breach of warranty. The continuation of litigation in the Dicharry Action against Aetna Casualty and Surety Company threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendant Anna Piccinin has a civil action pending in The United States District Court for The Middle District of Alabama. In her complaint, Ms. Piccinin asserts claims against Robins and The Aetna Casualty and Surety Company. Ms. Piccinin seeks recovery from those defendants under theories of conspiracy, fraud, negligence, misrepresentation and breach of warranty. The continuation of litigation in the Piccinin Action against The Aetna Casualty and Surety Company will impair and impede the debtor's reorganization effort.

Defendants Luisa Mosa and Jack Mosa have a civil action pending in The United States District Court for the District of Maryland. In their complaint, the Mosas assert claims against Robins and Dr. Hugh J. Davis. The Mosas seek recovery from those defendants under theories of fraud and deceit, involuntary testing and battery, negligence, strict liability, breach of warranty, violation of the Federal Food and Drug Act and conspiracy. The continuation of litigation in The Mosa Action against Dr. Hugh J. Davis threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendants Stella J. Camp and John H. Camp have a civil action pending in The Circuit Court for Madison County, Alabama. In their complaint, the Camps assert claims against Robins, D.L.K., Incorporated and John or Jane Does numbers three through nine. The Camps seek recovery from those defendants under theories of negligence, strict liability, misrepresentation, breach of warranty, conspiracy and fraud. The continuation of litigation in The Camp Action against any of Robins' co-defendants threatens to impair and impede the debtor's reorganization effort.

Defendants Helen Barnett and Michael Barnett have a civil action pending in the Circuit Court of the Ninth Judicial Circuit, Orange County, Florida. In their complaint, the Barnetts assert claims against Robins, Aetna Casualty and Surety Company, Florida Physicians Supply, Incorporated and Medical Supply Company of Jacksonville. The Barnetts seek recovery from those defendants under theories of willful negligence, fraud and misrepresentation, violation of State and Federal Food and Drug Acts, strict liability, breach of warranty and battery. The continuation of litigation in the Barnett Action against any of Robins' co-defendants threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendant Edna Lindsey Ruminski has a civil action pending in the Superior Court for the Judicial District of New Haven, Connecticut. In her complaint, Ms. Ruminski asserts claims against Robins and Dr. Marshall R. Holley. Ms. Ruminski seeks recovery from those defendants under theories of negligence. The continuation of litigation in the Ruminski Action against Dr. Marshall R. Holley threatens to impair and impede the debtor's reorganization effort.

The eight civil actions described above are representative examples of similar civil actions among the approximately 2,400 civil actions currently pending against Robins which name persons or entities other than Robins as co-defendants. The continuation of litigation in those approximately 2,400 civil actions against the various categories of co-defendants represented by the eight civil actions described above would pose a serious threat to the success of the debtor's reorganization and is contrary to the public interest.

Conclusions of Law

The District Court exercising its jurisdiction under 28 U.S.C. Sections 1334(b) and (d), has the authority pursuant to 11 U.S.C. Section 105 and 28 U.S.C. Section 1651, to stay all actions which adversely affect the estate of the debtor and the

debtor's reorganization effort and to stay all actions which will impair and impede the debtor's reorganization effort.

Robins has established that the likelihood of irreparable harm to Robins if this injunction is not granted outweighs the likelihood of irreparable harm to the defendants if the injunction is granted.

Robins has established the likelihood of its success on the merits and the likelihood of a successful reorganization if it is not burdened by continued litigation against it and its co-defendants.

Robins has established that the granting of this preliminary injunction is in the public interest.

The conclusions of law contained in this order constitute the law of this case and shall be applied with equal force to all defendants similarly situated who are brought to the attention of this court.

To the extent any of the foregoing conclusions of law constitute findings of fact, they are to be deemed as such, and vice-versa.

Order

Based upon the foregoing, and good cause appearing therefor, it is hereby

DECLARED all available proceeds of liability insurance issued to Robins are property of the debtor's estate pursuant to 11 U.S.C. Section 541 and any civil action seeking a judgment that might be satisfied from the proceeds of that insurance is automatically stayed pursuant to 11 U.S.C. Section 362(a);

ORDERED defendant Nancy Campbell is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 85-C-230-S currently pending in the United States District Court for the Western District of Wisconsin; and further

ORDERED defendant Kathryn Conrad is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 85231036 currently pending in the Circuit Court for the City of Baltimore, State of Maryland; and further

ORDERED defendants Jeanette Dicharry and Vernon Dicharry are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 85-1243 currently pending in the United States District Court for the Eastern District of Louisiana; and further

ORDERED defendant Anna Piccinin is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. CV-85-H-9120-N currently pending in the United States District Court for the Middle District of Alabama; and further

ORDERED defendants Luisa Mosa and Jack Mosa are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. H82-49 currently pending in the United States District Court for the District of Maryland; and further

ORDERED defendants Stelia J. Camp and John H. Camp are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. CV-85-671-W currently pending in the Circuit Court for Madison County, State of Alabama; and further

ORDERED defendants Helen Barnett and Michael Barnett are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 83-5426 currently pending in the Circuit Court for the Ninth Judicial District, Orange County, State of Florida; and further

ORDERED defendant Edna Lindsey Ruminski is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. CV-81-0209979-S currently pending in the Superior Court for the Judicial District of New Haven, State of Connecticut.

This injunction shall remain in force until further order of this Court.

DATED: October 11, 1985
Nunc pro tunc 10-9-85

/s/ ROBERT R. MERHIGE, JR.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

Case No. 85-01307-R
Retained Proceeding
(Judge Merhige)

In Re A. H. ROBINS COMPANY, INCORPORATED
Debtor
EMPLOYER'S TAX IDENTIFICATION NO. 54-0486348

ORDER PURSUANT TO 28 U.S.C. SECTIONS 157(b)(5) AND 1334(b) AND 11 U.S.C. SECTION 105(a)

Upon the motion of A. H. Robins Company, Incorporated ("Robins"), for orders pursuant to 28 U.S.C. Sections 157(b)(5) and 1334(b), and 11 U.S.C. Section 105(a) for determination of trial venue, identification of cases "related to" this Chapter 11 case and transfer of cases; the Court having considered the motion, the memorandum of law, the Statement of Financial Affairs For Debtor Engaged in Business Question 12 (Exhibit 1), and having heard the arguments of counsel and good cause appearing therefor, it is hereby

ORDERED, pursuant to Sections 157(b)(5) and 1334(b) of Title 28 of the United States Code, that to the extent personal injury tort or wrongful death actions against Robins or any other defendant that are related to the Robins Chapter 11 case are to be tried in a district court, such action shall be tried in the Richmond Division of the United States District Court for the Eastern District of Virginia; and it is further

ORDERED, pursuant to Section 1334(b) of Title 28 of the United States Code, that all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield intrauterine contraceptive device are proceedings related to this Chapter 11 case over which this Court has jurisdiction; and it is further

ORDERED that all actions related to the Robins Chapter 11 case, as determined by this Order, now pending in any federal district court or subsequently removed to any federal district court during the pendency of this Chapter 11 case, be transferred by the Clerks of those Courts to this Court; and it is further

ORDERED that nothing contained herein shall affect or limit the power of this Court to abstain from hearing any particular proceeding under Section 1334(c)(1) of the United States Code or remanding any particular proceeding under Section 1452(b) of the United States Code.

/s/ ROBERT R. MERHIGE, JR.
U.S. District Judge

DATED: November 9, 1985

We ask for this:

/s/ CLIFFORD W. PERRIN, JR.

William R. Cogar
Clifford W. Perrin, Jr.
Mays, Valentine, Davenport
& Moore
Post Office Box 1122
Richmond, Virginia 23208

Patrick A. Murphy
Penn Ayers Butler
Murphy, Weir & Butler
101 California Street, 39th Floor
San Francisco, California 94111

A. H. ROBINS COMPANY,
INCORPORATED,

Appellee,

v.

Anna PICCININ

Appellant,

and

Nancy Campbell, Kathryn Conrad, Jeanette Dicharry, Vernon Dicharry, Luisa Mosa, Stella J. Camp, John H. Camp, Helen Barnett, Michael Barnett, and Edna Lindsey Ruminski, Defendants.

Aetna Casualty and Surety Company,

Intervenor/Appellee.

In re A. H. ROBINS COMPANY, INCORPORATED

Debtor.

A. H. ROBINS COMPANY, INCORPORATED,

Appellee,

v.

COMMITTEE REPRESENTATIVES OF
DALKON SHIELD CLAIMANTS,

Appellants.

AETNA CASUALTY AND SURETY COMPANY,

Intervenor/Appellee.

In re A. H. ROBINS COMPANY, INCORPORATED,

Debtor.

A. H. ROBINS COMPANY, INCORPORATED,

Appellee,

v.

KATHRYN CONRAD, LUISA AND JACK MOSA,

Appellants.

In re A. H. ROBINS COMPANY, INC.,

Debtor.

A. H. ROBINS COMPANY, INC.,

Appellee,

v.

ANNA PICCININ,

Appellant.

Nos. 85-2183 to 85-2185.

United States Court of Appeals,
Fourth Circuit.
Argued Dec. 3, 1985.
Decided April 10, 1986.
Rehearing Denied May 14, 1986.

Debtor sought preliminary injunction restraining prosecution of products liability actions against codefendants. The United States District Court for the Eastern District of Virginia, Robert R. Merhige, Jr., J., granted preliminary injunction, and products liability plaintiffs appealed. The Court of Appeals, Donald Russell, Circuit Judge, held that: (1) debtor was entitled to preliminary injunction, and (2) district court had jurisdiction to fix venue for trial of all products liability cases and provide for transfer of cases to district in which bankruptcy court was sitting.

Affirmed in part and remanded with directions.

C. Neal Pope (Max R. McGlamry, Pope, Kellogg, McGlamry, Kilpatrick & Morrison, Atlanta, Ga., Robert L. Dolbeare, Richmond, Va., on brief), for appellant Anna Piccinin.

H. Robert Erwin, Jr. (Pretl & Schultheis, P.A., Baltimore, Md., on brief) for appellants Kathryn Conrad, Luisa Mosa and Jack Mosa.

Mark C. Ellenberg (Murray Drabkin; Cadwalader, Wickersham & Taft, Washington, D.C., George B. Little, L.B. Cann, III, Little, Parsley & Cluverius, P.C., Richmond, Va., on brief), for appellant Committee of Representatives of Dalkon Shield Claimants.

Patrick A. Murphy (Penn Ayers Butler, Michael Kip Maly, Murphy, Weir & Butler, San Francisco, Cal., William R. Cogar, Bradfute W. Davenport, Jr., Clifford W. Perrin, Jr., James S. Crockett, Jr., Mays, Valentine, Davenport & Moore, Richmond, Va., on brief), for appellee.

Jan Z. Krasnowiecki, Pepper, Hamilton & Scheetz, Philadelphia, Pa., for intervenor.

Before RUSSELL and CHAPMAN, Circuit Judges, and SWYGERT, Senior Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

DONALD RUSSELL, Circuit Judge:

Confronted, if not overwhelmed, with an avalanche of actions filed in various state and federal courts throughout the United States by citizens of this country as well as of foreign countries seeking damages for injuries allegedly sustained by the use of an intrauterine contraceptive device known as a Dalkon Shield,[1] the manufacturer of the device, A.H. Robins Company, Incorporated (Robins) filed its petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§101 *et seq.*, August, 1985.

Background

The device, which is the subject of these suits, had been developed in the 1960's by Dr. Hugh Davis at the Johns Hopkins Hospital in Baltimore, Maryland.[2] In mid-1970 Robins acquired all patent and marketing rights to the Dalkon Shield and engaged in the manufacture and marketing of the device from early 1971 until 1974, when it discontinued manufacture and sale of the device because of complaints and suits charging injuries arising allegedly out of the use of the device. The institution of Dalkon Shield suits did not, however, moderate with the discontinuance of manufacture of the device, since Robins did not actually recall the device until 1984.[3] By the middle of 1985, when the Chapter 11 petition was filed the number of such suits arising out of the continued sale and use of the Dalkon Shield device earlier put into the stream of commerce by Robins had grown to 5,000. More than half of these pending cases named Robins as the sole defendant; a co-defendant or co-defendants were named in the

1. For the current FDA regulation on intrauterine devices, *see* 21 C.F.R. §310.502 (1984).

2. Book Note, 99 Harv.L.Rev. 875 (1986) (reviewing Engelmayer and Wagman, *Lord's Justice: One Judge's Battle to Expose the Deadly Dalkon Shield I.U.D.* (1985)).

3. In response to that recall, Engelmayer & Wagman, *supra*, note 2, at 878, n. 8, state that 4,500 women had removed the shield as of August, 1985, at a cost of $1,600,000.

others. Prior to the filing, a number of suits had been tried and, while Robins had prevailed in some of the actions, judgments in large and burdensome amounts had been recovered in others. Many more had been settled.[4] Moreover, the costs of defending these suits both to Robins and to its insurance carrier had risen into the millions. A large amount of the time and energies of Robins' officers and executives was also being absorbed in preparing material for trial and in attending and testifying at depositions and trials. The problems arising out of this mounting tide of claims and suits precipitated this Chapter 11 proceeding.

The filing of the Chapter 11 petition automatically stayed all suits against Robins itself under section 362(a) of the Bankruptcy Code, even though no formal order of stay was immediately entered. *See In re Larmar Estates*, 5 B.R. 328, 330 (Bankr.E.D.N.Y. 1980). But a number of plaintiffs in suits where there were defendants other than Robins, sought to sever their actions against Robins and to proceed with their claims against the co-defendant or co-defendants. Robins responded to the move by filing an adversary proceeding in which it named as defendants the plaintiffs in eight such suits pending in various state and federal courts. In that proceeding, the debtor sought (1) declaratory relief adjudging that the debtor's products liability policy with Aetna Casualty and Insurance Company (Aetna) was an asset of the estate in which all the Dalkon Shield plaintiffs and claimants had an interest and (2) injunctive relief restraining the prosecution of the actions against its co-defendants. Service of the summons and complaint in that adversary proceeding, a memorandum of law in support of the motion for a preliminary injunction therein, a notice of the debtor's intention to apply for a temporary restraining order, a copy of the proposed temporary restraining order and affidavits in support were duly mailed by

---

4. Engelmayer & Wagman, *supra*, note 2, at 876, n. 6, state that of the approximately 7,500 Dalkon Shield cases settled from 1972 to February 1985, fewer than 40 went to a jury.

A recent article in the Nat.L.J., p. 10 (March 17, 1986), states that by mid 1985, Robins, along with its insurer, Aetna Casualty & Surety Company, "had paid roughly $517 million for 25 trial judgments and 9,300 settlements since the first verdict in 1975."

first-class mail and by Federal Express to all the defendants and their attorneys at their addresses. *See* Bankruptcy Rule 7004 and Rule 4, Fed.R.Civ.P.

The debtor's application for a temporary restraining order and for the setting of a date for a hearing on the request for preliminary injunction in the adversary proceeding was heard *ex parte* by the district judge who had jurisdiction over the proceedings.[5] The district judge granted at the time a temporary restraining order in the proceedings and set a hearing on the debtor's application for a preliminary injunction. On that same day, Robins mailed by first-class mail and by Federal Express to all the defendants and their attorneys at their addresses "Notice of Hearing on Plaintiff's Motion for Preliminary Injunction."

At the hearing on the motion for a preliminary injunction, a number of defendants as well as the Committee constituted by the court to represent Dalkon Shield Claimants appeared by counsel.[6] At the commencement of the hearing the defendant Piccinin, a plaintiff in one of the Dalkon Shield actions which Robins sought to stay, filed through her attorney a written motion to dismiss as against her. No other defendant filed a motion in response to the motion for a preliminary injunction. After receiving certain testimony, admitting various records, and hearing arguments of parties, the district court granted Robins' request for a preliminary injunction.

In his order granting the preliminary injunction, the district judge found (1) that continuation of litigation in the civil actions threatened property of Robins' estate, burdened and impeded Robins' reorganization effort, contravened the public interest,

---

5. Section 104 of the 1984 Amendments to the Bankruptcy Code provides that "[i]n each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for the district. Each bankruptcy judge . . . may exercise the authority conferred under this chapter . . . except as otherwise provided by law or by rule or order of the district court."

6. For a discussion of the authorization for and responsibilities of such Committees, *see* Note, *The Chapter 11 Creditors' Committee; Statutory Watchdog?* 2 Bankr.Dev.J., 247 (1985)).

and rendered any plan of reorganization futile; (2) that this burden on Robins' estate outweighed any burden on the Dalkon claimants caused by enjoining their civil actions; and (3) that all remaining insurance coverage in favor of the debtor under its liability policy issued by Aetna was property of the Robins' Chapter 11 estate. The district judge then held that all actions for damages that might be satisfied from proceeds of the Aetna insurance policy were subject to the stay pursuant to 11 U.S.C. §362(a)(3) and enjoined further litigation in the eight civil actions, pursuant to 11 U.S.C. §362(a)(1), (3) as supplemented by 11 U.S.C. §105.

Only the defendants Piccinin, the Mosas, and Conrad filed timely notices of appeal from the grant of the preliminary injunction. Their appeals, questioning the propriety of that preliminary injunction as against suits by Robins' co-defendants is the first of the issues now before this Court.

Some three weeks after entry of the preliminary injunction, Robins filed a motion for (1) a determination of trial venue of all Dalkon Shield suits, (2) identification of such Dalkon Shield cases as were "related to" the Chapter 11 case, and (3) transfer of such cases to the Eastern District of Virginia for trial. It also requested an expedited hearing on these motions. This request for an expedited hearing was granted and the expedited hearing was set ten days later. Notice of the hearing was given the Representatives of the Dalkon Shield Claimants Committee and the Unsecured Creditors Committee. The Committees and the defendants Piccinin, the Mosas and Conrad appeared by counsel at the hearing and joined in entering objections to the motion.

After a hearing on the motions, the district judge entered an order holding that (1) pursuant to 28 U.S.C. §1334(b), all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield were proceedings related to this Chapter 11 case over which this court had jurisdiction; (2) pursuant to 28 U.S.C. §§157(b)(5)[7] and 1334(b), all such actions,

7. In Chatz & Schumm, *1984 Bankruptcy Code Amendments—Fresh from the Anvil*, 89 Com. L.J., 317, 319-20 (1984), the authors refer to these two sections as the "critical sections" of the Amendments, establishing as they do what "a bankruptcy court can and cannot do."

wherever pending, were to be tried in the Richmond Division of the United States District Court for the Eastern District of Virginia; (3) all actions related to the Robins' Chapter 11 case now pending in any federal district court or subsequently removed to any federal district court, during the pendency of this Chapter 11 case, were to be transferred to this court [the Richmond Division of the United States District Court]; and (4) nothing in the order limited the power of this court [the Richmond Division of the United States District Court] later to abstain from hearing any proceeding under section 1334(c)(1) or remanding under section 1452(b), 28 U.S.C.

From this order, the Committee of Representatives of Dalkon Shield Claimants and the defendant Piccinin have appealed.[8] This appeal poses the second issue on appeal.

I.

The initial question in the appeal of the first issue relates to the court's jurisdiction to grant a stay or injunction of suits in other courts against co-defendants of the debtor or of third parties; none of the parties herein contest the jurisdiction of the bankruptcy court to stay actions against the debtor itself in any court. Jurisdiction over suits involving co-defendants or third-parties may be bottomed on two statutory provisions of the Bankruptcy Act itself as well as on the general equitable powers of the court. The first of these statutory grants of jurisdiction is found in section 362, 11 U.S.C. The purpose of this section by its various subsections is to protect the debtor from an uncontrollable scramble for its assets in a number of uncoordinated proceedings in different courts, to preclude one creditor from pursuing a remedy to the disadvantage of other creditors, and to provide the debtor and its executives with a reasonable respite from protracted litigation, during which they may have an opportunity to formulate a plan of reorganization for the debtor. *Matter of Holtkamp*, 669 F.2d 505, 508 (7th Cir. 1982). As the Court in *Fidelity Mortg. Investors v. Camelia Builders, Inc.*, 550 F.2d 47,

8. An order of the Honorable H. Emory Widener, Jr., after a motion for a stay pending appeal, permitted Aetna to intervene. Aetna appears in the appeal.

55 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093, 97 S.Ct. 1107, 51 L.Ed.2d 540, put it, "[t]he stay insures that the debtor's affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditors' interests with one another."

Section 362 is broken down into several subsections, only two of which are relevant on this appeal. The first of such subsections is (a)(1), which imposes an automatic stay of any proceeding "commenced or [that] could have been commenced against the debtor" at the time of the filing of the Chapter 11 proceeding; the second is (a)(3), which provides similar relief against suits involving the possession or custody of property of the debtor, irrespective of whether the suits are against the debtor alone or others. We shall discuss the extent of jurisdiction given the bankruptcy court under these two subsections, beginning with (a)(1).

(a)

Subsection (a)(1) is generally said to be available only to the debtor, not third party defendants or co-defendants. The rationale for this narrow construction of the statute has been stated in *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1196-97 (6th Cir.1983), and in our own case of *Williford v. Armstrong World Industries, Inc.*, 715 F.2d 124, 126-27 (4th Cir.1983), and it need not be repeated here. However, as the Court in *Johns-Manville Sales Corp.*, 26 B.R. 405, 410 (S.D.N.Y. 1983) remarked, in discussing the oft-cited case, *Royal Trucks & Trailer v. Armadors Meritina Salvadoreana*, 10 B.R. 488, 491, (N.D.Ill.1981),[9] "there are cases [under 362(a)(1)] where a bankruptcy court may properly stay the proceedings against non-bankrupt co-defendants" but, it adds, that in order for relief for such non-bankrupt defendants to be available under (a)(1), there must be "unusual circumstances" and certainly " '[s]omething more than the mere fact that one of the parties to the lawsuit has filed a Chapter 11 bankruptcy must be shown in order that proceedings be stayed against non-bankrupt parties.' " This "unusual situation," it would seem, arises when there is such

9. This case is generally cited on the strict construction of this subsection.

identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor. An illustration of such a situation would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case. To refuse application of the statutory stay in that case would defeat the very purpose and intent of the statute. This fact was recognized by the court in *In Re Metal Center*, 31 B.R. 458 (D.Conn.1983).

In *Metal Center* the third-party plaintiff had been sued, along with the debtor, on his guaranty of the debtor's obligation. The third-party was entitled to be indemnified by the debtor on account of any judgment rendered against him because of his guaranty. While the action against both the debtor and the guarantor was pending, the debtor filed its Chapter 11 petition. The action was stayed against the debtor but the plaintiff sought to continue his suit against the guarantor. The guarantor at this point moved to stay the action as against him. The bankruptcy court reviewed the motion because of the possible "effect upon the debtor of a state court judgment against Gardner [the guarantor]." In discussing the issue, the court first dismissed as inapplicable to the facts of this case the situation where the third-party defendant was "independently liable as, for example, where the debtor and another are joint tort feasors or where the nondebtor's liability rests upon his own breach of duty." It noted that in such a case "the automatic stay would clearly not extend to such non debtor." But, in contrast to those situations, it declared that "where, however, a debtor and nondebtor are so bound by statute or contract that the liability of the nondebtor is imputed to the debtor by operation of law, then the Congressional intent to provide relief to debtors would be frustrated by permitting indirectly what is expressly prohibited in the Code." It concluded with the statement: "Clearly the debtor's protection must be extended to enjoin litigation against others if the result would be binding upon the debtor's estate," and this is so, whether the debtor is a party or not. 31 B.R. at 462.

It is true that, although the third-party defendant in *Metal Center* was found to be entitled to indemnity from the debtor, the court held that the situation was not such as to qualify for a stay under section 362(a)(1). The court reached this conclusion because in its opinion the judgment in the suit against the third-party would not be binding on the bankruptcy court. Of course, if the indemnitee, who has suffered a judgment for which he is entitled to be absolutely indemnified by the debtor, cannot file and have allowed as an adjudicated claim the actual amount of the judgment he has secured but must submit his claim for allowance in the bankruptcy proceeding with the prospect that his claim may not be allowed in the full amount of the judgment awarded in favor of him, the indemnitee will be unfairly mulcted by inconsistent judgments and his contract of indemnity in effect nullified. We do not accept such reasoning with its shocking result and would find a stay under (a)(1) acceptable. Apparently the court in *Metal Center* recognized the inconsistency and the injustice resulting from its refusal to sustain a stay under (a)(1) for *it did grant a stay* of the action against the third-party but *on equitable grounds*, finding in justification that "severing and remanding [the plaintiff's action against the indemnitee to the state court for trial and judgment would] . . . potentially expose[s] Gardner [the indemnitee] to inconsistent judgments." 31 B.R. at 463. While, as we have said, it seems that a ruling sustaining the stay in that case under section 362(a)(1) would have been more logical and appropriate, it is unimportant whether the stay is granted under section 362(a)(1) or on equitable grounds: the result is the same; a stay is proper in such a situation.

In *Seybolt v. Bio-Energy of Lincoln, Inc.*, 38 B.R. 123 (D.Mass.1984), the issue was similar to that in *Metal Center*, *i.e.*, whether a guarantor entitled to indemnity by the debtor would be entitled to seek a stay under section 362(a)(1). In granting the stay in that case, the Court, after quoting the language of *Metal Center* with respect to the case in which "the liability of the non-debtor is imputed to the debtor by operation of law," said:

> The concept that notice and an opportunity to defend binds the principal on a judgment against a guarantor (in a case in

which the principal did not participate) springs from notions of res judicata. If George Seybolt recovers a judgment against the guarantors in the state court, Bio-Energy Associates' assertion that the $100,000 was not a loan but a contribution to capital may well be rendered moot when the guarantor subsequently asserts a claim against it for indemnity. At the very least, the dual litigation of these issues in the state court and the bankruptcy court is not judicially economic and potentially exposes Bio-Energy, Inc. and Bio-Energy Associates to inconsistent judgments. *See In Re Metal Center, Inc., supra*, at 463.

Accordingly, I find that George Seybolt's claims against the individual guarantors are within this Court's jurisdiction and should be stayed until an appropriate motion for relief from stay is filed and granted by the bankruptcy court. 38 B.R. at 127-28.

In Re Brentano's, 27 B.R. 90 (S.D.N.Y. 1983), also involved the situation of a guarantor of a debtor in a Chapter 11 proceeding who was entitled under contract to indemnity by the debtor against any judgement against him. While the case did not directly concern section 362 but the question of bankruptcy jurisdiction, the language of the court appears relevant on the issue under review here. It said that the action against the guarantor-indemnitee "could and would affect the estate in bankruptcy," since, under the indemnity agreement, "a judgment in favor of the [plaintiff] in the guaranty action would automatically result in indemnification liability against Brentano's" [*i.e.*, the indemnitor]. Accepting this language one would have difficulty in not concluding that the action was in effect one against the debtor and as such would qualify for relief under (a)(1). *Brentano's* is cited and discussed in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 995 (3d Cir. 1984), which was an asbestos case. The issue in *Pacor*, as in *Brentano's*, was one of bankruptcy jurisdiction. The court described the facts in *Brentano's* and stated the resulting legal situation as follows:

> In *Brentano's*, however, it is clear that the action between the landlord and MacMillan could and would affect the estate in bankruptcy. By virtue of the indemnification agreement between Brentano's and MacMillan, a judgment in favor of the landlord on the guarantee action would automatically result in indemnification liability against Brentano's. *See also In re Johnie T. Patton, Inc.*, 12 B.R. 470 (Bankr. D. Nev. 1981); *In re Lucasa International, Ltd.*, 6 B.R. 717 (Bankr. S.D.N.Y. 1980); *In re Brothers Coal Co.*, 6 B.R. 567 (Bankr. W.D. Va. 1980) (all involving guarantors of debtor's obligations). Moreover, even in the absence of an explicit indemnification agreement, an action by a creditor against a guarantor of a debtor's obligations will necessarily affect that that [sic] the creditor's status vis a vis other creditors, and administration of the estate therefore depends upon the outcome of that litigation. 743 F.2d at 995.

Pacor, however, found *Brentano's* inapplicable in its case because:

> In this case, however, there would be no automatic creation of liability against Manville on account of a judgment against Pacor. Pacor is not a contractual guarantor of Manville, nor has Manville agreed to indemnify Pacor, and thus a judgment in the Higgins-Pacor action could not give rise to any automatic liability on the part of the estate. 743 F.2d at 995.

The clear implication of the decision is that, if there had been a contract to indemnify, a contrary result would have been in order.

(b)

But (a)(1), which stays actions against the debtor and arguably against those whose interests are so intimately intertwined with those of the debtor that the latter may be said to be the real party in interest, is not the only part of section 362 providing for an automatic stay of proceedings. Subsection (a)(3) directs stays of any action, *whether against the debtor or third-parties*, to obtain possession or to exercise control over property of the debtor. A key phrase in the construction and application of this section is, of course, "property" as that term is used in the Act. Section 541(a)(1) of the Bankruptcy Act defines "property" in the bankruptcy context. It provides that the "estate is comprised of all the following property, wherever located . . . all legal or equitable interests of the debtor in property as of the commencement of the case." The Supreme Court in construing this language in *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205, n. 9, 103 S.Ct. 2309, 2313, n. 9, 76 L.Ed.2d 515, quoted this language in the legislative history of the Section:

> The scope of this paragraph [541(a)(1)] is broad. It included all kinds of property including tangible or intangible property, causes of action (see Bankruptcy Act §70a(6)), and all other forms of property currently specified in section 70a of the Bankruptcy Act.

Under the weight of authority, insurance contracts have been said to be embraced in this statutory definition of "property." *In re Davis*, 730 F.2d 176, 184 (5th Cir.1984). For example, even the right to cancel an insurance policy issued to the debtor has uniformly been held to be stayed under section 362(a)(3). Lam, *Cancellation of Insurance: Bankruptcy Automatic Stay Implications*, 59 Am.Bank, L.J., 267 (1985), (extensively reviewing the cases to this effect). A products liability policy of the debtor is similarly within the principle: it is a valuable property of a debtor, particularly, if the debtor is confronted with substantial liability claims within the coverage of the policy in which case the policy may well be, as one court has remarked in a case like the one under review, "the most important asset of [*i.e.*, the debtor's] estate," *In re Johns Manville Corp.*, 40 B.R.

219, 229 (S.D.N.Y.1984). Any action in which the judgment may diminish this "important asset" is unquestionably subject to a stay under this subsection. *In re Johns Manville Corp.*, 33 B.R. 254, 261 (S.D.N.Y.1983). Accordingly actions "related to" the bankruptcy proceedings against the insurer or against officers or employees of the debtor who may be entitled to indemnification under such policy or who qualify as additional insureds under the policy are to be stayed under section 362(a)(3). *Ibid.*[10]

(c)

The statutory power of the bankruptcy court to stay actions involving the debtor or its property is not, however, limited to section 362(a)(1) and (a)(3). It has been repeatedly held that 11 U.S.C. §105 which provides that the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," "empowers the bankruptcy court to enjoin parties other than the bankrupt" from commencing or continuing litigation. *In re Otero Mills, Inc.*, 25 B.R. 1018, 1020 (D.N.M.1982).[11] In that case, the Court said:

---

10. There is nothing in *In Re White Motor Credit*, 761 F.2d 270, 274 (6th Cir.1985) in any way contrary to this conclusion; in fact, it sustains the construction of the statute adopted by us. In *White*, the parties were in agreement that the products liability insurance was adequate to cover all claims filed but the court cautioned that had this not been so, the result in that case would have been different:

> Were it not for the fact that all parties are in agreement that the insurance coverage is adequate to cover all filed claims, it would be necessary to liquidate all claims before any insurance was paid out; otherwise some claimants would receive an unequal portion of the insurance assets of the debtor.

It is obvious from that statement of the court that *White* actually sustains the result reached by us that, if the liability insurance is inadequate to satisfy in full all claims under the insurance, the actions by claimants should be stayed and the claims should be "liquidated" in the bankruptcy court.

11. There can be no dispute that the Bankruptcy Reform Act of 1978 and like language later in section 1334(b) of the Bankruptcy Amendments of 1984 greatly enlarged the jurisdiction of the bankruptcy courts and were, as stated in the legislative history, intended to "leave no doubt as to the scope of the bankruptcy court's jurisdiction over disputes." H.Rep. No. 95-595, 95th Cong.2d Sess. 445, *reprinted in* 1978 U.S., Code Cong. & Adm.News, 5963,

> Appellant cites only one case decided under the 1978 Bankruptcy Code which found that the bankruptcy court lacked [under §105] the power to enjoin parties from pursuing actions against non-bankrupts in state court. *In re Aboussie Brothers Construction Co.*, 8 B.R. 302 (E.D.Mo.1981). In *Aboussie*, the court did not address §105(a), but relied on cases decided under the old Bankruptcy Act to hold that there was no jurisdiction to enjoin parties from pursuing actions which did not involve the bankrupt directly. The pre-1978 Act confined jurisdiction to "the debtor and his property, wherever located." Act of June 22, 1938, ch. 575, §1, 52 Stat. 906 (1938). Under the new Bankruptcy Code, the jurisdictional statute provides that the bankruptcy court shall have jurisdiction "of all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C.A. §1471 (Supp.1982). This broader jurisdictional statute, combined with §105(a),

---

6401. Those sections provide jurisdiction in the bankruptcy case over any proceedings arising in or related to a title 11 case. The accepted definition of the "related to" in these statutes is that declared in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir.1984):

> An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

See also Note, *Selective Exercise of Jurisdiction in Bankruptcy-Related Civil Proceedings*, 59 Tex. L.Rev. 325, 330-31 (1981):

> One can imagine controversies over which the new bankruptcy courts [under 1471(b)] would have jurisdiction even if neither the debtor nor a representative of the estate were a party, and it is difficult to imagine any instance in which a bankruptcy court would not have jurisdiction if the debtor were a party.

It is true that both *Pacor* and the Texas Note were referring to section 1471(b) of the 1978 Act. That section, however, was re-enacted in the exact words of the repealed 1471(b) in section 1334(a) and (b) of the 1984 Act. Therefore, "[t]he jurisdiction conferred on the district court [under the 1984 Act's section 1334(a) and (b)] is exactly the same jurisdiction that was conferred on the district courts under the Bankruptcy Reform Act [of 1978]." Taggart, *The New Bankruptcy Court Systems*, 59 Am.Bank.L.J. 231, 239 (1985). To the same effect, King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 Vand.L.Rev. 675, 677 (1985).

> grants the bankruptcy court power to enjoin parties from proceeding in state court against non-bankrupts where the state proceeding is related to a case arising under Title 11, 25 B.R. at 1020.

In stating the same scope for section 105, the Court in *Johns-Manville Corp.*, 26 B.R. 420, 425 (S.D.N.Y.1983), quoting from 2 Collier on *Bankruptcy* §§362.02 and 362.05 (15th ed. 1982), put the matter thus:

> [Section 362 of the Code] does not attempt to state the jurisdiction of the bankruptcy court with respect to stays and injunctive relief or to determine the boundaries of the exercise of the court's injunctive power.
>
> Section 105 which is the successor to Section 2A(15), gives the court the power to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.
>
> [T]he exceptions to the automatic stay of §362(a) which are set forth in §362(b) are simply exceptions to the stay which protect the estate automatically at the commencement of the case and are not limitations upon the jurisdiction of the bankruptcy court or upon its power to enjoin. That power is generally based upon §105 of the Code. The court will have ample power to enjoin actions excepted from the automatic stay which might interfere in the rehabilitative process whether in a liquidation or in a reorganization case.

See to the same effect, In Re Landmark, 19 B.R. 556, 559 (N.D.Ohio 1982); *In Re Larmar Estates, Inc.*, 5 B.R. 328, 330-31 (S.D.N.Y.1980).

Accepting that section 105 confers on the bankruptcy court power under its expanded jurisdiction as expressed in section 1471(b) [28 U.S.C.] of the Bankruptcy Reform Act of 1978 and now section 1334(b), 28 U.S.C. of the 1984 Bankruptcy Amendments to enjoin suits against parties in other courts, whether state or federal, it is necessary to mark out the circumstances

under which the power or jurisdiction may be exercised. In *Otero Mills*, *supra*, the Court approved a ruling that "[t]o so enjoin a creditor's action against a third party, the court must find that failure to enjoin would effect [sic] the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through the third party." 25 B.R. at 1020. In *Johns-Manville*, the Court phrased somewhat fuller the circumstances when section 105 may support a stay:

> In the exercise of its authority under §105, the Bankruptcy Court may use its injunctive authority to "protect the integrity of a bankrupt's estate and the Bankruptcy Court's custody thereof and to preserve to that Court the ability to exercise the authority delegated to it by Congress" [citing authority]. Pursuant to the exercise of that authority the Court may issue or extend stays to enjoin a variety of proceedings [including discovery against the debtor or its officers and employees] which will have an adverse impact on the Debtor's ability to formulate a Chapter 11 plan. 40 B.R. at 226.

(d)

Beyond these statutory powers under section 362 and section 105 to enjoin other actions whether against the debtor or third-parties and in whatsoever court, the bankruptcy court under its comprehensive jurisdiction as conferred by section 1334, 28 U.S.C., has the "inherent power of courts under their general equity powers and in the efficient management of the dockets to grant relief" to grant a stay. *Williford v. Armstrong World Industries, Inc.*, *supra*, 715 F.2d at 127, *Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 5 (1st Cir. 1983). In exercising such power the court, however, must "weigh competing interests and maintain an even balance" and must justify the stay "by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford*, *supra*, *Metal Center* and *Seybolt*, discussed *supra*, are illustrative of situations in which courts have found sufficient grounds to grant a stay under this power.

(e)

There are thus four grounds on which the bankruptcy court may enjoin suits against the bankrupt or its assets and property. In some instances only one of these grounds may be relevant; in an involved and complex case, several or even all of the grounds may require consideration. The present case is such an involved and complex case. It has a striking similarity to a Chapter 11 proceedings, initially begun in the bankruptcy court of the Southern District of New York, concerning the reorganization of the Johns-Manville Corporation. In that proceeding, which was litigated both in the New York and Louisiana courts, many of the issues posed on this aspect of the case were raised and analyzed by the courts of the two circuits and the decisions resolving such issues present in a practical form the application of the power of a bankruptcy court to stay actions relating to the bankruptcy proceeding against the debtor, its property and their operations. For this reason, it seems pertinent to review the decisions in those proceedings, for their guidance on the resolution of the issue herein. We begin with the initial proceedings in the bankruptcy court of the Southern District of New York.

(f)

Johns-Manville, an asbestos producer, was beset by a mass of suits seeking large awards for damages sustained by reason of asbestos exposure much as has Robins in this case and, after suffering large and burdensome recoveries by plaintiffs and making substantial settlements in many of the cases, filed its Chapter 11 petition in the Southern District of New York in August, 1982. Such filing operated as an automatic stay of all proceedings against Johns-Manville. However, many of the thousands of cases named as defendants not only Johns-Manville but a number of other asbestos producers and dealers as co-defendants. Shortly after Johns-Manville filed its Chapter 11 petition, these co-defendants, charged in the complaints of the plaintiffs in the actions as joint tort feasors, sought judicial relief in the bankruptcy court, "inviting," that court by way of a declaratory judgment in the exercise of "its equitable powers" to enlarge the automatic stay provided by section 362 of the Act to include

nondebtor defendants "under the penumbra of section 362's protection" as well as under section 105, and to extend this stay throughout the nation to all asbestos litigation. *Matter of Johns-Manville Corp.*, 26 B.R. 405 (S.D.N.Y. 1983). The primary issue at this stage was stated to be "whether this Court should take the unprecedented step of exercising its discretion pursuant to section 105 of the Code to extend the section 362 automatic stay so as to encompass the co-defendants herein." 26 B.R. at 408-409. The bankruptcy court ruled, first, "that section 362 is limited in scope to the debtor and does not operate to stay actions against the co-defendants of this debtor." 26 B.R. at 409-414. Secondly, it held that relief under section 105 is only available if found to be "necessary or appropriate in order to achieve the goals of a Chapter 11 reorganization," and, even then, only after a finding that "a failure to enjoin would affect the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through that third-party," thereby justifying a finding of irreparable injury and likelihood of prevailing on the merits. None of these facts the court found present on the instant showing, but it added:

> In an appropriate case, where the proposed extension of the stay is designed to cover actions against entities that truly are inextricably interwoven with the debtor or which affect property of the debtor's estate, section 105 may be used. *In the instant case, such is not the situation as any liability of these co-defendants is not directly attributable to the debtor as it would be if these co-defendants were, for example, key employees of the debtor.* 26 B.R. at 418 (italics in text).

It concluded by declaring that there was "no basis [as shown by the record] to extend the section 362 stay to cover them [the appeals] by means of section 105."

A second action was begun shortly afterwards, this time by the debtor, to enjoin (1) the prosecution of "proceedings against Manville's employees, agents and others" and of discovery proceedings involving them in actions covering "the same issues and subject-matter as are involved in the stayed litigations against

Manville," (2) " 'direct action' lawsuits against insurers and sureties of the debtor"[12] since the coverage of such policies of insurance or suretyship "represent[ed] property of [the debtor's] estate which must be preserved for the benefit of all creditors," and (3) a suit brought by certain security holders against "various of the 'employees, agents and others' " in the district court of Colorado. *In re Johns-Manville Corp.*, 26 B.R. 420, 423 (S.D.N.Y.1983). It will be observed that this proceeding involved matters not litigated in the earlier proceeding; in fact, it involved actions against the debtor's employees for actions attributable to Manville, precisely the point which the court in the earlier case had said was not before it at that time. The bankruptcy court granted a temporary injunction against the continuance of either the suits or of discovery against present or future officers, employees and agents but refused a stay for past officers and employees. In reaching that conclusion it found that "in great measure the suits being pursued against Manville's officers and employees are in reality derivative of identical claims brought against Manville," which, if sustained against the officers and employees, would expose the estate "to claims for contribution and indemnification" and might result in collateral estoppel against the debtor "in subsequent actions." 26 B.R. at 426. It accordingly held it proper to stay these actions and discovery "against [such] non-debtors which would frustrate the statutory scheme or impact adversely on a debtor's ability to formulate a plan or on the debtor's property." 26 B.R. at 427. It further granted the injunction against the security action, finding "that [such] suit is nothing more than an effort to circumvent section 362 by suing Manville's officers and directors when the real party in interest is Manville. In all but formal detail, the [security] litigation is against the debtor within the meaning of section 362." 26 B.R. at 428. It, also, said that:

---

12. "Direct actions" against insurers are described in *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 546-47 (5th Cir.1983), and were recognized in *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48, 50, 75 S.Ct. 151, 153, 99 L.Ed. 59 (1964).

> An adverse judgment in the [security] case would have serious consequences for the debtor's estate. Manville's By-Laws require it to indemnify its officers and directors for their litigation expenses, including any amounts paid to satisfy a judgment of liability, so long as the conduct at issue was intended to benefit the company . . . Although Manville believes that the insurance policies which it had in force cover these expenses, the insurance company has reserved its right to contest coverage and to terminate on 30 days notice the payment of defense costs. If the insurance company fails to live up to its obligations, the officers and directors would look to the Company for reimbursement pursuant to the By-Laws. In any event, the policies have specific dollar limits beyond which Manville itself must pay. To the extent expenditures related to the (security) suit exhaust those limits, an asset of the estate is diminished and Manville's exposure in other litigations increases. 26 B.R. at 429.

But it denied a stay of the suits against the insurers and sureties, saying:

> Unlike suits against the debtor's employees and agents, Manville maintains no obligation to indemnify or pay for the defense costs of its insurers or sureties. Thus, the liability of these insurers and sureties in no way inures to the detriment of the Manville estate. 26 B.R. at 431.

On motion for rehearing, however, the bankruptcy court withdrew its decision denying an injunction against suits directed against the debtor's insurers and granted such injunction. It did so on the basis of these findings:

> The debtor "could be adversely affected by the continuation of such suits" since the "insurance policies and proceeds thereof and the causes of action previously asserted by Manville against its insurance carriers in suits pending in California ("California Insurance Litigation") and elsewhere constitute a substantial property of the Manville estate which will be diminished if and to the extent that third party

direct actions against the insurance carriers result in plaintiffs' judgments" and since "important issues respecting policy coverage and liability may be pressed as collaterally estopping Manville." 26 B.R. at 435. Further, "[t]o permit the third party actions to continue against Manville's insurance carriers will result in a multiplicity of positions and defenses on the part of the insurance carriers and will most likely result in inconsistent decisions and rulings concerning the coverage and liability of the insurance carriers to the third party claimants and to Manville. Such a disorganized and fragmented procedure for resolving such major issues will undermine Manville's attempt at reorganization." 26 B.R. at 436.

It ended with these legal conclusions:

1. "Manville's rights under its insurance policies and all the causes of action arising thereunder constitute property of the Manville estates within the purview of section 541(a) of the Code." 26 B.R. at 436.

2. "Pursuant to § 105(a), the Bankruptcy Court may extend the automatic stay under § 362 of the Code to stay and enjoin proceedings or acts against non-debtors where such actions would interfere with, deplete or adversely affect property of Manville's estates or which would frustrate the statutory scheme of Chapter 11 or diminish Manville's ability to formulate a plan of reorganization." 26 B.R. at 436.

3. Pursuant to § 362(a) of the Code, all actions "to obtain possession of or, interfere with property from Manville estates" are stayed and enjoined. 26. B.R. 436.

As a result of action in the Fifth Circuit to which we later advert and in order to enlarge the stay theretofore granted to include *past* officers and employees, (the court having reached the decision that suits against past as well as present employees of the debtor should be stayed) the bankruptcy court in New York entered a third reported decision in 33 B.R. 254 (S.D.N.Y. 1983). It found that:

> In the event of a recovery against the past or present officers, directors or employees of Manville in any of the pending 1,000 cases, Manville's insurers may be called upon to indemnify such officers, directors and employees under the provisions of the policies issued by them to Manville. If such insurers are called upon to make such indemnification payments, those payments may cause an asset of the Manville estates to be diminished. 33 B.R. at 261.

It reiterated in this same decision its ruling that the insurance policies constituted assets of the debtor, and stated the test for granting a stay or injunction in the circumstances: "(a) possible irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." It concluded by granting the stay in favor of the insurers and the past as well as present directors, officers and employees, finding that the required findings for a preliminary injunction had been satisfied. 33 B.R. at 262-63.

On appeal of certain of these decisions, the district court affirmed the decisions of the Bankruptcy Court staying discovery of any officers, directors or employees of the debtor and ruled that the provisions of section 362 stayed proceedings against the debtor's insurers. Specifically, it declared that "the fact that it [Manville] ultimately may not receive all of the proceeds under its products liability insurance does not affect its status as property under the Code subject to the provisions of the automatic stay." 40 B.R. at 230.

At the same time that these Johns-Manville cases were proceeding in New York, similar issues were arising in asbestos cases filed against Johns-Manville, other joint tortfeasors, and their insurers in the three districts of Louisiana. The three district courts had ruled differently on the right to a stay of all co-defendants of Manville, there being no dispute that the stay was proper of Manville itself. On appeal, the Court of Appeals held in *Wedgeworth v. Fibreboard*, 706 F.2d 541 (5th Cir. 1983), that the automatic stay applied only to Manville, not to the other

defendants and that the showing as made was insufficient to sustain a stay in favor of the co-defendants under equitable principles; however, it sustained the right of the plaintiffs to amend their complaints to state a "direct action" under the Louisiana statute against Manville's insurer and held that such an action was not stayed by any provision of the Bankruptcy Act. After a petition for rehearing, however, the Court modified its decision on the plaintiffs' motion to amend and held "that the district court did not abuse its discretion in declining to permit the plaintiffs to amend their complaints to add, as party defendants, the liability insurance carriers of Johns-Manville and Unarco." 706 F.2d at 548. Two days after this decision was filed, the bankruptcy court modified its previous orders by staying "any and all suits against any past, present or future Manville officer, director or employee or against [his or her] insurers." It added in this order, also, that its prior order would be amended to preclude discovery of the parties against whom suits were proscribed. In an appeal based on a petition for certiorari and for a writ of prohibition against a contempt order against plaintiffs' counsel for violating such stay, the orders of the bankruptcy court were in effect sustained in *In Re Davis*, 730 F.2d 176 (5th Cir. 1984).

(g)

As we have earlier indicated, we have discussed at some length these proceedings in the Johns-Manville proceedings in New York and Louisiana, because, with their striking similarity both factually and on the legal issues to this case, the decisions of those courts provide persuasive guidance for our action herein. Though the district judge below did not cite the various rulings of the Manville courts in support of his decision, there was a close identity of issues between those in the *Manville* cases and in the present case. In the three situations in which the defendants have challenged the injunction granted by the district judge [i.e., the Mosa, Conrad and Piccinin cases], the only defendants other than the debtor, are the two Robins, Dr. Frederick A. Clark, Jr., Dr. Hugh J. Davis, and the debtor's insurer Aetna. So far as the suits against the two Robins and Dr. Clark, those defendants were entitled to indemnification by the

debtor under the corporate by-laws and the statutes of Virginia, the State of debtor's incorporation,[13] and were, in addition, additional insureds under the debtor's insurance policy. Dr. Davis was the beneficiary of an express contract of indemnification on the part of Robins and was, under a compromise agreement with Robins and Aetna, an additional insured under Robins' insurance policy. The Manville court had granted a preliminary injunction in favor of defendants in the same position as these defendants, as we have seen, on facts similar to those here, finding that the requirements of possible irreparable harm "had been satisfied by the showing ... [that the suits against the defendants would represent] an immediate and irreparable impact on the pool of insurance assets, of the existence of sufficiently serious questions going to the merits," and of the tipping in the defendants' favor in the hardships in a balancing of the debtor's and the plaintiffs'. 33 B.R. at 262-63. That court had previously disposed of the public interest being weighted in the debtor's favor. "Indeed, this Court finds the goal of removing all obstacles to plan formulation eminently praiseworthy and supports every lawful effort to foster this goal while protecting the due process rights of all constituencies." 26 B.R. at 428.

II.

The district court in this case applied the test for a grant of preliminary injunctive relief as stated by us in *Blackwelder Furniture*, 550 F.2d 189, 195 (4th Cir.1977), and *Televest v. Bradshaw*, 618 F.2d 1029, 1032 (4th Cir.1980). It found, as had

13. It is the accepted practice for corporations such as the debtor to indemnify their directors, officers and employees for the costs of their defense for any judgment rendered against them in such cases. *See A.D.M. Corp. v. Thorison*, 707 F.2d 25, 28 (1st Cir.1983); 13 Fletcher, *Cyclopedia of the Law of Corporations*, § 6045.1 and 6045.3 (1980 ed.). Virginia, the State of the debtor's incorporation, has by statute empowered corporations of that State, by their charter, to provide for such indemnity. Section 13.1-3, 1 Virginia Code; Fletcher, *supra*, section 6045.-2-235. The charter of the debtor, included in the record, provides such right of indemnification for the directors, officers and employees of the debtor in the broadest sense. As we have seen, a stay in favor of such officers, directors and employees, protected as they are by the right to indemnity from the debtor, and the record in this case shows undisputably that these directors and employees are so protected, was in order.

the Johns-Manville courts, that irreparable harm would be suffered by the debtor and by the defendants since any of these suits against these co-defendants, if successful, would reduce and diminish the insurance fund or pool represented in Aetna's policy in favor of Robins, and thereby affect the property of the debtor to the detriment of the debtor's creditors as a whole. The likelihood of success by the debtor under these circumstances appeared indisputable. The hardships which would be suffered irreparably by the debtor and by its creditors generally in permitting these plaintiffs to secure as it were a preference in the distribution of the insurance pool, herein to which all creditors were entitled, together with the unquestioned public interest in promoting a viable reorganization of the debtor can be said to outweigh any contrary hardship to the plaintiffs. Such was the finding in the *Manville* cases and that finding does not appear unreasonable here.

The appellants, however, suggest that the record is insufficient to support such findings by the district judge. We disagree. The record is not extensive but it includes every fact considered by the courts in the *Manville* cases to be necessary for their decision. The rights of Dr. Davis, Dr. Clark and the two Robins to indemnity and their status as additional insureds under Robins' insurance policy are undisputed on the record. That there are thousands of Dalkon Shield actions and claims pending is a fact established in the record and the limited fund available under Robins' insurance policy is recognized in the record. It seems incontestable that, if the suits are permitted to continue and discovery allowed, any effort at reorganization of the debtor will be frustrated, if not permanently thwarted. It is obvious from the record that if suits are permitted to proceed against indemnitees on claims on which the indemnitees are entitled to indemnity by Robins, either a binding judgment against the debtor will result or, as the court in *Metal Center* said, inconsistent judgments will result, calling for the exercise of the court's equitable powers. In our opinion, the record was thus more than adequate to support the district court's grant of injunctive relief. Certainly, the district court did not commit an abuse of discretion in granting the injunction herein.

The appellants add a final complaining note that the district judge state in his decision that the "Conclusions of Law" made by him should apply "with equal force to all defendants similarly situated who are brought to the attention of the court." This is little different, however, from the language of the court in the *Manville* cases in which there was a broad, general injunction against all present or future suits.

In summary, we have no difficulty in sustaining the grant of a preliminary injunction herein. We are sustained in this conclusion by the fact, recognized by the district judge on the record, that any Dalkon Shield plaintiff may at any time petition for the vacation of the stay as it affects his or her suit and he or she is entitled to a hearing on such petition. Actually, there is one such petition pending and the district judge has agreed to set a hearing on that petition.

III

The second appeal questions the validity of the district court's order of November 9, 1985, fixing the venue for the trial of all Dalkon Shield cases and providing for the transfer of such cases to the District Court of the Eastern District of Virginia at Richmond. Robins has challenged the appealability of such order. We find the challenge without merit.

It is unquestionably true that, as the Court in *In Re Amatex Corp.*, 755 F.2d 1034, 1038-39 (3rd Cir. 1985), declared, jurisdiction in a Court of Appeals to review a decision or order of a district court sitting in bankruptcy is controlled by § 1291, 28 U.S.C. *See also Matter of UNR Industries, Inc.*, 725 F.2d 1111, 1114-16 (7th Cir. 1984). While section 1291 limits jurisdiction to appeals from "all final decisions of the district courts," the concept of finality under such statute has traditionally been applied "in a more pragmatic and less technical way in bankruptcy cases than in other situations." *Amatex, supra*, at 1039. Judge Breyer in *In Re Saco Local Development Corp.*, 711 F.2d 441, 443-45 (1st Cir. 1983) has traced this traditional rule of more liberal construction of finality as applied to appeals in bankruptcy cases over

the years. In tracing appealability under the statute in bankruptcy cases, Judge Breyer noted the definition of a "proceeding" in bankruptcy as stated in *Taylor v. Voss*, 271 U.S. 176, 181, 46 S.Ct. 461, 463-64, 70 L.Ed. 889 (1926), as "not the overall liquidation or reorganization, but rather an individual 'matter[ ] of an administrative character . . . presented in the *ordinary course* of the administration of the bankrupt's estate." (Emphasis added by Judge Breyer). He then declared on the basis of this determination that "any dispute between a bankrupt and his creditors over a claim or priority was a separate 'proceeding' and an order settling such dispute was appealable." 711 F.2d at 445. Such is but another practical expression of the principle that "finality" under 1291 is to be given not an absolute and inflexible construction in bankruptcy cases in which a "functional" and "practical" application is to be the rule.

The special or unique reason for this relaxed rule of appealability in bankruptcy is that

> [b]ankruptcy cases frequently involve protracted proceedings with many parties participating. To avoid the waste of time and resources that might result from reviewing discrete portions of the action only after a plan of reorganization is approved, courts have permitted appellate review of orders that in other contexts might be considered interlocutory. *In Re Amatex*, *supra*, at 1039.

This particular appeal illustrates well the justification for the relaxed rule of appealability in bankruptcy cases. Should appeal be denied and trials proceed in the district court of the myriad of claims involved with the possibility of reversal on appeal from a final decision in such proceedings, months and months of litigation, carried on at great expense to all concerned might be voided and the reorganization derailed, with consequent extensive delays both in reorganization and in resolution of the claims of the tort plaintiffs themselves. Weighty considerations of fairness and efficient judicial administration, therefore, mandate appealability in this case. We accordingly dismiss Robins' challenge to the appealability of the order in question.

Were it necessary, appealability could be sustained under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47, 69 S.Ct. 1221, 1225-26, 93 L. Ed. 1528 (1949), as well as in mandamus. *See In re Ralson Purina Co.*, 726 F.2d 1002, 1005 (4th Cir.1984). We, however, prefer to ground our decision on the more relaxed standard of finality for appeal purposes under 1291 traditionally assigned bankruptcy appeals.

Turning to the merits of the appeal on this part of the case, we address first the power of the district court, sitting in bankruptcy, to enter an order fixing the venue for the trial of tort personal injury claims against the debtor and for transferring all such cases to the bankruptcy court for trial and disposition. Section 157(b)(5) 28 U.S.C. states:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankrupcy case is pending.

We do not understand the appellants to contend that under this language the district court did not have authority under this statute to issue an order fixing the venue for trial of tort cases against a Chapter 11 debtor. They do argue, however, that the sense of the section, if not its precise language, was to decentralize the trial of these tort claims and to permit their continuance for trial in the court in which the complaints were filed and that the ruling of the district judge in this case fixing venue in the district court in which the bankruptcy petition was filed flies in the face of this congressional purpose. They refer to the language of Senator Dole in commenting on the Senate Conference Report on the 1984 amendments and construe it as suggesting that tort claims were to be tried in the court in which those claims were originally filed. Senator Dole, in the language to which appellants refer and out of which the appellants arrive at their finding of the sense of the Congress, actually restated simply the language of the statute itself. He said that "where abstention does

not occur,[14] those cases [i.e., "personal injury cases"] will be handled by the district court where the bankruptcy has been filed or, if that court finds it appropriate, where the claim arose." Statement by Hon. Robert Dole 130 Cong.Rec. S 8889 (daily ed. June 29, 1984), *reprinted in*, 1984 U.S. Code Cong. & Ad.News 586, 587. We discern nothing in that language to warrant the conclusion that, in enacting the statute the Congress favored decentralizing the administration of the bankruptcy by leaving all "personal injury cases" to the court in the place where the claim "arose." In fact, to accept the view of the appellants on the construction of the statute would be completely at variance with the House version of the bill, which was in effect accepted by the Conference Committee, and would be to adopt the Senate version, which, according to Congressman Kastenmeier's statement as a House Conference member, was "largely reject[ed]" by the Conference Committee and "would have dissipated the assets of the estate by creating a multiplicity of forums for the adjudication of parts of a bankruptcy case."[15]

Nor do we find anything in *In re White Motor Credit*, 761 F.2d 270, 273-74 (6th Cir.1985), also relied on by the appellants, that lends support to appellant's construction of § 157(b)(5). The extent of the holding in *White Motor* was that the district court had the power under the statute to allow products liability cases to be tried where the claim arose; there was nothing in the opinion, however, that declared that such action was mandated or even preferred. Specifically, there was no statement in the opinion that the district court in which the bankruptcy was pending could not try the claim. Unquestionably the district court in this case had the power under the statute to fix the trial venue in its district for all the Dalkon Shield cases.

The primary point of difference between the parties, however, relates not so much to the power of the district court in this

14. "Mandatory abstention under section 1334(c)(2) is not applicable to personal injury claims, but the district court may abstain as a matter of discretion and lift the stay of the state court action." Taggart, *The New Bankruptcy Court System*, 59 America Bank.L.J. 231, 253 (1985).

15. Statement by the Hon. Robert Kastenmeier, 130 Cong.Rec. H.7492, *reprinted in* 1984 U.S. Code Cong. & Adm.News at 579.

case to fix venue for all the pending Dalkon Shield tort cases—that power is stated in unmistakable terms in section 157(b)(5)—but to the manner in which that power may be exercised. Concededly, section157(b)(5) does not prescribe any procedure. The appellants suggest that the procedure to be followed is laid out in 28 U.S.C. § 1412, which provides that "[a] district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." As the appellants correctly construe section 1412, the authority to transfer a suit under the statute rests solely with the court in which the suit is pending and it provides no authority whatsoever to a district court sitting in bankruptcy in one district and having jurisdiction of the bankruptcy to transfer the venue of a case against the bankrupt to another district. Section 157(b)(5), however, expressly confers on the district court sitting in bankruptcy and having jurisdiction of the bankruptcy proceedings the power to fix the venue of any tort case against the debtor pending in other districts. The purpose of this latter statute was, as Congressman Kastenmeier declared, to centralize the administration of the estate and to eliminate the "multiplicity of forums for the adjudication of parts of a bankruptcy case." 130 Cong.Rec. H 7492, June 29, 1984, *reprinted in* 1984 U.S.Code Cong. & Adm.News at 579. That purpose would be thwarted and the plain language of section 157(b)(5) nullified if the power of the district court sitting in bankruptcy to fix the venue for tort claims against a debtor was to be preempted by the provisions of section 1412. We do not believe this to have been the intention.of Congress in enacting the two statutes. Section 157(b)(5) was drafted to cover the procedure in connection with a special group of cases, to wit, personal injury tort claims against a debtor in Chapter 11 proceedings wherever pending and in that connection the section is supreme. In all other cases related to the bankruptcy proceedings, however, the general statute (*i.e.*, section 1412) would govern. This, we think, is the proper construction to be given the two statutes. It is a construction which harmonizes the two sections. It conforms to that established canon of statutory construction that "[w]e must read the statutes [in those instances where there is any possible conflict] to give effect to each if we

can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267, 101 S.Ct. 1673, 1678, 68 L.Ed.2nd 80 (1981); *Columbia Gas v. Federal Energy Regulatory Comm.*, 651 F.2d 1146, 1158 (5th Cir.1981); *Pennsylvania v. Dept. of Health & Human Resources*, 723 F.2d 1114, 1119 (3rd Cir.1983). To accept the appellants' interpretation and to negate the plain language of § 157(b)(5) "would violate the basic principle of construction that statutes should be read, if possible, as harmonious texts." *Leaf Tobacco Exporters Assn. v. Block*, 749 F.2d 1106, 1115 (4th Cir. 1984). We, therefore, have no difficulty in finding that the district judge's authority to fix venue of personal injury tort actions against the debtor exists under § 157(b)(5), irrespective of the district in which such controversy is pending.

And there are very real considerations that support a centralization of all the Dalkon Shield claims, *at least at first*, in the district court having jurisdiction of the bankruptcy. The "single focal point" of this proceeding is the development of a reasonable plan of reorganization for the debtor, one which will work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the Dalkon Shield claims. *See In re Towner v. Petroleum Co.*, 48 B.R. 182, 190 (W.D. Okla.1985). These Dalkon Shield claims, asserted by thousands of individuals in courts throughout the United States on behalf of both citizens of this country and citizens or residents of other countries, represent what are characterized in the Act as "contingent or unliquidated claims." 11 U.S.C. § 502. Ordinarily such claims would be "estimated" by the bankruptcy court as a "core proceeding," 28 U.S.C. § 157(b)(2), for purpose of allowance if failure to do so "would unduly delay the administration of the case." 11 U.S.C. § 502(c); 3 Collier on *Bankruptcy*, § 502-03 (15 ed. 1982). That duty of estimation in a proper case under section 502(c) is not a permissive one; it is a mandatory obligation of the bankruptcy court. *In re Nova Real Estate Inv. Trust*, 23 B.R. 62 (E.D.Va.1982). This customary process of estimation of contingent claims is, however, different where the unliquidated contingent claims are personal injury tort claims.

Section 157(b)(2)(B) excepts from the definition of "core proceedings" personal tort claims against the debtor. The bankruptcy court thus is without authority under the Act over "the liquidation or estimation of contingent or unliquidated personal injury or wrongful death claims against the estate for purposes of *distribution* under Title 11" 28 U.S.C. § 157(b)(2)(B). (Italics added) It will be observed, however, that the statute denies authority to the bankruptcy court to "estimate" contingent claims only if the purpose is to make a "distribution" of the assets of the debtor; the statute does not in express terms deny to the bankruptcy court the authority, or relieve it of the duty, to "estimate" the contingent "personal injury" claims for purposes of determining the feasibility of a reorganization. And such has been the construction of the statute which has been adopted by the courts which have had to face the issue, the two leading cases being proceedings arising out of the asbestos litigation. *Roberts v. Johns-Manville Corp.*, 45 B.R. 823, 825-26 (S.D.N.Y.1984); *In re UNR Industries, Inc.*, 45 B.R. 322, 326-27 (N.D.Ill.1984). Both of these cases hold that estimations of the debtors' potential personal injury tort liabilities as an incident of the development of a plan of reorganization are core proceedings within the bankruptcy court's jurisdiction, and that such estimations are not foreclosed by Section 157(b)(5) of the Act.[16]

---

16. *Roberts* at 826 said:

> Even assuming that section 157(b)(5) requires that all personal injury and wrongful death claims be tried in the district courts, the Court does not find that immediate withdrawal and liquidation of Roberts' claim is appropriate. Section 157(b)(2)(B) does not exclude from the definition of core proceedings estimations of personal injury and wrongful death claims for all purposes. The section is limited to estimation "for purposes of distribution." This leaves estimation for other purposes within the jurisdiction of the bankruptcy court. *See In re UNR Industries*, 45 B.R. 322 (N.D.Ill.1984). A trial is not needed, therefore, to satisfy the requirement of section 502(c) that "all claims against the debtor be converted into dollar amounts." (citing Congressional sources). Thus, even if the Code and the 1984 Act require that each and every asbestos claim filed in this eventually be tried, they do not require immediate withdrawal of those claims before a reorganization plan has been confirmed.

This is not to say the personal injury claimants in this proceeding will not be ultimately entitled, if they elect to do so, to have a jury trial of their claim in the district court. Section 157(b)(5) gives them that right. But, even though the tort claimants may be entitled to their jury trials, the bankruptcy court is not relieved of its duty in a Chapter 11 proceeding to estimate those contingent claims. The real question thus arises as to which proceedings takes precedence, whether the estimation by the bankruptcy court of the claims or the jury trials in the district court of the claims. The authorities which have considered this question in connection with a complicated products liability situation such as this are all unanimous. The estimations of the potential and pending claims by the bankruptcy courts should precede any trials of the claims. This was specifically held in the asbestos cases. *Roberts v. Johns-Manville Corp.*, 45 B.R. at 825-26. After all, the first and primary purpose of the proceedings, however, is to ascertain whether a fair reorganization of the debtor can be achieved. This purpose may well be completely thwarted if the energies of the debtor's executives and officers are initially diverted by, and the resources of the debtor are dissipated in the expenses of litigating, the trial of thousands of personal injury suits in courts throughout the land spread over an interminable period of time. As the Court in *Newton v. Johns-Manville Corp.*, 45 B.R. 827, 830 (S.D.N.Y.1984), put it, in explaining its decision to proceed in the estimation of the claims before setting any claim for trial: there is no "sense in ordering a trial of a [tort claimant's] claim against Manville until a plan has been developed for Manville and until there is reason to believe that the time and expense of potentially 25,000 personal injury trials of the claims against Manville will not deplete the estate and leave other creditors with empty judgments."

There are 5,000 suits pending against the debtor in this proceeding. There are perhaps an equal number not filed. If all these claims were to be tried, the expense of discovery proceedings and trial would likely consume all the assets of the debtor and exhaust all the resources of its executives and employees. As one court has commented, we "must be mindful of the realities of modern litigation. Pre-trial discovery under modern federal

practice has become a monster on the loose . . . Pre-trial proceedings have become more costly and important than trials themselves." *In re Johns-Manville*, *supra*, 40 B.R. at 224. Since the Dalkon Shield litigation began, forty claims have actually been tried but over $517,000,000 have been expended in defending or settling Dalkon Shield suits or claims. It is impossible to anticipate the stupendous costs that would be involved if all the claims here had to be tried. If the claimants as a whole are to realize reasonable compensation for their claims, it is obviously in the interest of the class of claimants as a whole to obviate the tremendous expense of trying these cases separately. If the bankruptcy court could arrive at a fair estimation of the value of all the claims and submit a fair plan of reorganization based on such estimation, with some mechanism for dispute resolution and acceptable to all interested parties, great benefit to all the claimants could be achieved and the excessive expense of innumerable trials, stretching over an interminable time, could be avoided.[17] In addition, the real purpose of the proceeding (*i.e.*, a reorganization of the debtor and its continuance as a going business) could be attained.

It is manifest, of course, that the process of estimation will involve some examination of the claims. But this examination will be conducted by the court, will likely not involve duplicative discovery, and can be accomplished expeditiously. It was argued in *In re UNR Industries, Inc.*, 45 B.R. 322 (N.D.Ill.1984), though, that this would require a hearing by the bankruptcy court in making its estimation of the tort claims and accordingly would "not be any more efficient than ordering district court trials." The court dismissed the argument with this apt comment:

---

17. Section 157(b)(5) "does not mandate that all tort actions must be tried in district court, but only those which are not settled otherwise . . . ." Bankruptcy Service, L.Ed. § 2:14:5, at 22 (Supp. 1985) (summarizing *Roberts v. Johns-Manville*, *supra*, 45 B.R. at 825-26), and "the parties are certainly free to agree to a dispute-resolution procedure that does not involve trial," *UNR*, *supra*. 45 B.R. at 326. To the same effect is *Newton v. Johns-Manville Corp.*, 45 B.R. 827, 830 (S.D.N.Y. 1984).

> This contention both understates the time and expense of trials and overstates the time and expense of the estimation process. Even should Judge Toles decide the Towers study is insufficient to accurately estimate asbestos claims and that some sort of hearing is necessary, there is no reason to believe 17,000 hearings must be held to get an accurate enough picture of the debtor's liability to asbestos victims. 45 B.R. at 326.

That language is applicable in this case. It is unlikely that all 8,000 to 10,000 claims which have been filed would have to be tried before an intelligent estimation of the claims could be made by the bankruptcy court. The interests of all the claimants and the public interest in a reasonable and fair reorganization combine in favor of an effort at an estimation of the Dalkon Shield claims as a basis for formulating such a plan of reorganization and as a possible step in working out a mechanism acceptable to all the claimants for a dispute-resolution of their claims without burdening the estate with the tremendous expense of endless litigation and reducing if not exhausting, the assets available for paying those claims.

No progress along estimating these contingent claims, however, can be made until all Dalkon Shield claims and suits are centralized before a single forum where all interests can be heard and in which the interests of all claimants with one another may be harmonized. *Cf. Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47, 55 (2d Cir.1976), *cert, denied*, 429 U.S. 1093, 97 S.Ct. 1670, 52 L.Ed.2d 372. That undoubtedly was the purpose of the motion to fix venue and to transfer the pending suits to the district court sitting in bankruptcy before which the proceedings were pending. This unquestionably was the idea which prompted the district court to opt tentatively in his order fixing venue in the district court sitting in bankruptcy for all these claims. We approve of the idea and find it conducive of the interests of all concerned.

However persuasive may be the reasons for fixing temporarily at least venue of all the pending suits against the debtor in the district court sitting in bankruptcy where all the other

Dalkon Shield claims not in suit may be handled together, the question remains as to what procedure must be followed in effecting such change of venue in order to satisfy the requirements of due process. It is the position of the appellants that a right of action in tort is "property" which may not under due process be adversely affected by an involuntary change of venue in the absence of a full hearing after reasonable notice. It may be accepted that, as the appellants argue, a tort claim or action is a "species of property" in the constitutional sense. *Logan v. Timmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1153-54, 71 L.Ed.2d 265 (1982); *cf. Martinez v. California*, 444 U.S. 277, 281-82, 100 S.Ct. 553, 557, 62 L.Ed.2d 481 (1980). Similarly, it may be agreed that where the plaintiff has such a claim against a debtor in a Chapter 11 proceeding, he has a statutory right to a jury trial in a district court and that the place of such trial is an important right which may be entitled to some form of due process protection under the broad principles of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The question is, though, what form such protection must take.

"Due process" does not establish an inflexible standard to be rigorously applied in all cases. Recently, in *McClelland v. Massinga*, 786 F.2d 1205 (4th Cir. 1986), we said that "due process is not 'a technical conception' of 'inflexible procedures' (citing *Cafeteria Workers v. McElroy*, 367 U.S 886, 895, 81 S.Ct. 1743, 1748-49, 6 L.Ed.2d 1230 (1961) nor is it 'a mechanical instrument' or 'yardstick'; it is rather 'a delicate process of adjustment' and of a balancing of interests in which it is recognized 'that what is unfair in one situation may be fair in another . . . .' " In particular, it is important to recognize that the notice and hearing is not "*always* require[d] . . . prior to the initial deprivation of property" and that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportuntiy given for ultimate judicial determination of liability is adequate." *Parratt v. Taylor*, 451 U.S. 527, 540, 101 S.Ct. 1908, 1915, 68 L.Ed.2d 420 (1981). We conclude therefore, that due process requires some form of notice and opportunity for a hearing before there can be

a change of venue and before trial of a personal injury tort cause of action against a debtor may be transferred *finally* from the court in which the cause was initially filed to the district where the bankruptcy proceedings are pending.

We reach this conclusion not only under due process analysis, but also under the language and Rules issued under the Bankruptcy Act. In our opinion, the debtor's motion herein qualified as a "contested matter" under the Act. As such it had to be begun by the filing of a motion with "reasonable notice and opportunity for hearing. . . . afforded the party against whom [the] the relief [was] sought." Bankruptcy Rule 9014. The debtor filed with the district court sitting in bankruptcy an appropriate motion for a fixing of venue and for transfer of tort claims against the debtor, and notice in the manner provided by the Rules in this case was given but only to the Committee of Representatives of Dalkon Shield claimants. There was no notice given the individual Dalkon Shield claimants who had causes of action against the debtor pending in court. Counsel for the debtor asserted in argument in district court in justification of failure to serve the individual plaintiffs in the tort actions that "in these cases the tradtional rule is that you serve the counsel for the Committee, and the Committee, the counsel then has the obligation to bring such matters as are appropriate to the attention of the members of the Committee," Counsel cited no authority for this "traditional rule." The Committee, however contends that notice to it was not notice to the indiviual claimants and that such notice did not satisfy the notice requirements of Bankruptcy Rule 9014 or of due process.

The role of Committees appointed under the Act as revised has received considerable discussion but remains somewhat uncertain. As we have already noted, the status and position of Chapter 11 Committees are thoroughly canvassed in Andrews, *The Chapter 11 Creditors' Committee: Statutory Watchdog?*, 2 Bankruptcy Developments Journal, 247 (1985). As that article indicates, the Committee's right to intervene and be heard in any proceeding is, we think, fairly established. *Matter of Marin Motor Oil, Inc.*, 689 F.2d 445, 454-6 (3d Cir.), *cert. denied*, 459 U.S. 1206, 103 S.Ct. 1196, 75 L.Ed.2d 440 (1983). In fact, the

Rules require that certain notices in the course of the proceedings must be given the Committee. But it seems clear under the Rules that the Committee is not authorized to represent the individual interests of any claimant, as distinguished from the general interests of all claimants, *In re Johns-Manville*, 26 B.R. 919, 926 (S.D.N.Y. 1983), and only in certain specific situations, no one of which is relevant here, may proper service be made on the Committee rather than on the individual claimants themselves under Bankruptcy Rule 2002(i). It follows that, in our opinion, service of notice of the hearing on the motion to fix venue and to transfer, as given only to the Committee did not represent compliance with Bankruptcy Rule 9014 or with due process.

Conceding that notice to the Committee did not qualify as service on the individual claimants, it does not follow that the absence of such notice may be fatal to due process in this proceeding. The notice to the Committee may have been sufficient under *Cleveland Bd. of Education v. Loudermill*, ____ U.S. ____, ____, 105 S.Ct. 1487, 1495, 84 L.Ed.2d 494, 506 (1984) to permit the issuance of a provisional or conditional order providing for a fixing of venue in the district court sitting in bankruptcy for all the pending Dalkon Shield cases against the debtor *but giving the claimants individual notice and an opportunity to object and to be heard before the order became final in any case where the plaintiff has filed an objection*. That procedure would satisfy due process under *Parratt* and the other cases. And, as we read the record as well as the formal order of the district court, this is precisely what the district court intended, though the language of its order may be obscure on the point.

The district court entered a ruling bringing for the time being all the pending suits against the debtor before the district court sitting in bankruptcy in order to proceed expeditiously in the reorganization but with the definite condition that any party might object and might petition for abstention in his or her case. It was in our opinion intended as a conditional order, though not clearly stated as such. We are of the opinion, because of this possible want of clarity in the order assailed, that such order must be modified to make it crystal clear that the determination

of venue therein is, as we have said, conditional, dependent finally and ultimately on a ruling to be made only after notice to all claimants advising them of their right to enter any objections they may have to such a tentative ruling and to submit a motion for abstention in their particular case.[18] The notice to be given all claimants could be in the form of a letter both to the claimant and to his or her attorney stating the conditional ruling made subject to a final hearing, to become final only after reasonable opportunity given all claimants to object and/or to seek abstention. We would think the notice should fix a time limit for the filing of objections by claimants and should fix a day for a hearing on the objections. The tentative order might be made final as to any claimant who failed to enter an objection within the prescribed time. The mailing of the notice as required will not involve any great expense. Such a modification of the order, followed by a notice in the form suggested, it would seem, should satisfy the requirements of due process and of the Bankruptcy Rules in the unusual circumstances of this case. In order to achieve this modification in the order of the district judge, this phase of the appeal is remanded to the district court for further proceedings in accordance with the opinion herein.

We do not presume to suggest rigid guidelines for the district judge to follow when considering objections to the transfer. We believe it important, however, to observe that although there may be distinct advantages of the tort claims being transferred to Richmond, those advantages should be balanced against disadvantages that may be advanced at the hearing. In that regard, some cases may be fully prepared and ready for state trial. Some cases may require substantial numbers of local witnesses. Claimants may be receiving critical medical, physical or psychological care in a local area which would have to be halted

---

18. Until the conditional order is made final with regard to a particular case, a case should not be physically transferred. Thus, no filing fee shall be paid under Rule 9027 or expenditures accompanying photocopying, freight, etc. be made. Only after an order is final shall the expense of transfer be necessary.

or transferred to Richmond. All of these factors are relevant. Moreover, there are issues of state law that may substantially affect the results in individual cases.

In summary, we affirm the district court's order staying the suits of the plaintiffs against the debtor and all co-defendants, but remand with directions the order fixing venue for all pending suits against the debtor and transferring the suits to the district court before which the bankruptcy proceedings were pending.

AFFIRMED IN PART and REMANDED WITH DIRECTIONS.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION NO. 86-0315-R

GLENDA BRELAND, et al

vs.

AETNA CASUALTY & SURETY CO.

INITIAL PRE-TRIAL ORDER

Deeming it proper so to do, it is ADJUDGED and ORDERED that:

1. Unless already filed, answers to the complaint will be filed within ten (10) days of this date. Any such filing will not be deemed a waiver of any prior motions.

2. Counsel will meet with the Court in chambers at 1:00 P.M., on Wednesday, July 23, 1986, for purposes of setting this case for trial, and, if necessary, the setting of a date for a formal pre-trial conference.

3. All counsel should anticipate a trial date within ninety (90) days of this date except in cases of protracted litigation.

4. All counsel are admonished to expedite discovery.

5. Counsel attending are to be sufficiently knowledgeable of the case to respond to such queries as the Court may deem appropriate, and be prepared to discuss settlement prospects.

Let the Clerk send copies of this order to counsel of record and to *pro se* litigants.

/s/ ROBERT R. MERHIGE, JR.

United States District Judge

Date: July 7, 1986

APPENDIX C

Listing of Corporate Affiliations Prescribed by Rule 28.1 of the Rules of the Supreme Court of the United States

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, respondent Aetna Casualty & Surety Company, a corporation, identifies the following parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates:

1670 Broadway Joint Venture
1800 West Loop Tower Associates
ABP Associates Limited
ADB I
Abcor Insurance Administration
Administradora De Fondos De Pensiones Santa Maria S.A.
Aegen International, Inc.
Aetna Income Shares
Aetna Life and Casualty Limited
Aetna Life and Casualty of Canada Ltd.
Aetna Management Services Pty., Ltd.
Aetna Midland Doherty Finsco Ltd.
Aetna, Peterson, Jacobs and Ramo Technology Ventures
Aetna Variable Fund
Atalfa, Inc.
Beaver Creek Farms Joint Venture
BCI Satellite, Inc.
Biltmore Fashion Associates
Broadway Joint Venture
Callon Institutional Royalty Investors II
Carlsbad Research Center
Carlsbad Research Center Number One
Carlsbad Research Center Number Two
Chris-Town Village Associates
Church Insurance Partnership Agency
Churchill Office Park Ltd.
Compania De Seguros Generales Aetna Banchile S.A.
Cordova Del-Mar Associates
Coronation Drive Joint Venture

Corporate Center Pasadena Associates
Crescent Corporate Center
CS Development Corporation
Dayton Arcade Community Urban Redevelopment Corporation
Dayton Arcade Partnership
East Asia Aetna Insurance Company (Bermuda) Ltd.
Edina Office Center Joint Venture
Elliot S. Associates Limited
Empire Park Associates
Empire Park IV Associates
Ensenada De Las Colinas Asssociates
Friday Associates
Gearhart Industries, Inc.
Generali Do Brazil Companhia Nacional De Seguros
Golden State Associates
Hanover Properties
Hartford Center Hotel Partnership
Hayward Industrial Park Associates
Hillcrest Associates
Huffco U.S. Exploration 1982 Program
Huffco U.S. Exploration 1983 Program
Huffco U.S. Exploration 1984 Program
Ian Morton Underwriting Agency Limited
Japan and Far Eastern Securities Management Limited
KBC-Eastside Limited Partnership
KBC-Paradise Valley Limited
KBC-Red Hill Limited Partnership
Kemble Associates
Koll Center Newport A
Koll Center Newport 8
Koll Center Newport 9
Koll Center Newport 10
Koll Center Newport 11
Koll Center Newport 14
Koll Center Newport 15
La Estrella, S.A. De Seguros
Landex Properties Limited
Lincoln Benicia V, VI & VII

Lincoln Oakland Coliseum 1 & 11 Associates
Lincoln Rancho Cucamonga Associates
Lincoln San Jose VI Associates
Marex Properties Limited
Mariner Brookhollow Joint Venture
Meridian Associates
Montbello Commercial Venture 1
Montbello Commercial Venture 11
Northwest Associates
Oaks at Valley Ranch I
O'Hare Center Venture
Otau Mountain Estates
Parity Computer Limited
Partners National Health Plans
Pelican Beach Motel
Pelican Shores Motel
Ponderosa Homes
Portside Properties, Ltd.
Raintree-Carlton Court Associates
RAJ Boston Associates
RBA 11 Associates
Sabcap Pty., Ltd.
Sandefer Oil & Gas, Inc. 1982 Joint Venture
Sandefer Oil & Gas, Inc. 1983 Joint Venture
San Jose V Associates
Satellite Business Systems
Second & Main Associates
Silverada Mall
Southbank Unit Trust
South Bend Joint Venture
Southcap Pty., Ltd.
Southwest Financial Plaza
Southwest Financial Plaza Annex
St. Vincents Mall
Streamwood Industrial Properties
Taas Associates
Terra Nova Insurance Company Ltd.
Thace Associates

Transponder Leasing Associates
Tri-City Mall Associates
Tri Freeways Associates
Victoria Avenue Unit Trust
Village Park Limited Partnership
Washington Plaza
Westwood Mall Associates

Supreme Court, U.S.
FILED
SEP 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-211 & 86-216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ANNA PICCININ and COMMITTEE OF REPRESENTATIVES OF DALKON SHIELD CLAIMANTS,
Petitioners,

v.

A. H. ROBINS COMPANY, INCORPORATED, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

WILLIAM R. COGAR
Counsel of Record
CLIFFORD W. PERRIN, JR.
JAMES S. CROCKETT, JR.
LINDA J. THOMASON
MAYS & VALENTINE
P. O. Box 2426
Richmond, Virginia 23208
(804) 644-6011

MICHAEL L. COOK
DENNIS J. DREBSKY
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for A. H. Robins Company, Incorporated

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the District Court erred by enjoining, on the debtor's motion, an action by Petitioners against the debtor's co-defendant, when such action is found to affect the debtor's estate and to threaten the diversion of the debtor's key personnel from the reorganization effort.

2. Whether, pursuant to 28 U.S.C. § 157(b)(5), the District Court in a bankruptcy case may conditionally determine that a certain class of civil actions related to that Chapter 11 case will be tried in the district in which the Chapter 11 case is pending, subject to a subsequent final determination in each individual action if objection to venue is raised.

This Respondent is satisfied with the statement of Questions 2, 4 and 5 in No. 86-211.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
I. THE PRELIMINARY INJUNCTION	2
A. The District Court had jurisdiction to restrain Piccinin's action in the Middle District of Alabama	2
B. The Fourth Circuit's decision in *Piccinin* does not conflict with its prior decisions	5
II. THE VENUE ORDER	6
A. The Venue Order was required by the Bankruptcy Code	6
B. The Venue Order was not a final determination	6
C. *White Motor* is not inconsistent with the *Piccinin* opinion	8
D. Section 157(b)(5) is not unconstitutionally vague	10
E. The District Court may utilize 11 U.S.C. § 105 to effectuate its 28 U.S.C. § 157(b)(5) obligations	11
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page

A. H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986) 1
In re A. J. Mackay Co., 50 B.R. 756 (D. Utah 1985) 6
In re Christy, 44 U.S. (3 How.) 292, 391 (1845) 4
In re White Motor Credit, 761 F.2d 270 (6th Cir. 1985) 8, 9, 10
Northern Pipeline Const. Co. v. Marathon Pipeline Co., 458 U.S. 50, 97 (1982) (White, J. dissenting) 4
Williford v. Armstrong World Industries, Inc., 715 F.2d 124 (4th Cir. 1983) 5, 6

STATUTES

11 U.S.C.
Section 105(a) 11
Section 105(c) 11
28 U.S.C.
Section 157(b)(5) ..... *passim*
Section 1334(b) 4, 5
Section 1391 10
Section 1412 11
Fed. R. Civ. P. 4(c)(2)(C)(i) 3
Va. Code § 8.01-288 3

OTHER AUTHORITIES

1 L. KING, COLLIER ON BANKRUPTCY, § 105.01, at 105-2 (15th ed. 1985) 11
15 A. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3806 (1976) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 86-211 & 86-216

ANNA PICCININ and COMMITTEE OF REPRESENTATIVES OF DALKON SHIELD CLAIMANTS,

Petitioners,

v.

A. H. ROBINS COMPANY, INCORPORATED, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

Respondent A. H. Robins Company, Incorporated ("Robins"), respectfully submits this brief in opposition to the petitions for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in *A. H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986). For the reasons set forth below, the petitions should be denied.

STATEMENT OF THE CASE

While accepting Petitioners' statement of the case in No. 86-211, Robins wishes to emphasize that the judgment and opinion of the Fourth Circuit address two distinct orders of the United States District Court for the Eastern District of Virginia ("the District Court"). The

first was a preliminary injunction order entered on October 11, 1985 ("the Preliminary Injunction"), enjoining the continuation of actions involving the Dalkon Shield intrauterine contraceptive device that was manufactured and marketed by Robins. App. at A123-41.[1] The second order, entered November 9, 1985 ("the Venue Order"), contained the District Court's mandatory ruling pursuant to 28 U.S.C. § 157(b)(5) regarding venue for cases related to Robins' Chapter 11 case. App. at A142-45. In this order, the District Court ruled that all Dalkon Shield actions were related to the Chapter 11 case and the trial venue would be in the Eastern District of Virginia. On appeal, the Fourth Circuit remanded this order to the District Court with instructions to "make it crystal clear" that the order was conditional and that no case would be transferred to the Eastern District of Virginia without notice to the plaintiffs and their counsel and an opportunity to be heard on any objection to such transfer. App. at A101-02. Petitioner in No. 86-211 has asked this Court to review the Fourth Circuit's judgment and opinion with respect to both orders. Petitioner in 86-216 seeks review only of the Venue Order.

REASONS FOR DENYING THE WRIT

I. THE PRELIMINARY INJUNCTION

A. The District Court had jurisdiction to restrain Piccinin's action in the Middle District of Alabama.

Petitioner Anna Piccinin is a citizen of the United Kingdom residing in Rome, Italy. Pet. No. 86-211, inside front cover (unnumbered). Prior to the commencement of Robins' Chapter 11 case, Piccinin was the plaintiff in a civil action against Robins and the Aetna Casualty & Surety Company ("Aetna") pending in the United States

---

[1] All citations to the appendix refer to the appendix filed in No. 86-211.

District Court for the Middle District of Alabama ("the Alabama Action"). *Id.* at 2-4. Because Piccinin moved to continue the Alabama Action against Aetna after the Chapter 11 case was filed, Robins included her case with seven others in an adversary proceeding commenced in the Chapter 11 case, seeking a preliminary injunction against continued prosecution of the action. *A.H. Robins Co. v. Campbell, et al.*, No. 85-1006-R (Bankr. E.D. Va.) ("the Campbell Adversary Proceedings"). On September 25, 1985, Robins mailed, by first class mail, a copy of the summons, complaint, and all supporting documents in the Campbell Adversary Proceeding to her counsel in the Alabama Action and to Piccinin at her address in Rome, Italy. She admits that these papers were received. Pet. No. 86-211 at 5.

Piccinin's claim that the District Court lacked *in personam* jurisdiction over her is facially flawed. First, although Piccinin cites Robins' failure to obtain a delivery receipt for the papers mailed to her as a failure to conform to Rule 4(e) of the Federal Rules of Civil Procedure, any such defect does not defeat the validity of service under Virginia law, which also was available to Robins in the District Court. Fed. R. Civ. P. 4(c)(2)(C)(i). No form of service is defective under the law of Virginia if it is actually received by the defendant in time. Va. Code § 8.01-288.

Similarly, Piccinin's assertion that the District Court lacked jurisdiction over her person because of alleged insufficient contacts with the state of Virginia misperceives which contacts are relevant for purposes of bankruptcy jurisdiction. When a debtor commences an action under Title 11 of United States Code (the "Bankruptcy Code"), the immediate effect of filing the petition is the transfer of all claims arising in or relating to that bankruptcy case to the bankruptcy court.

> Sound policy . . . and a just regard to public as well as private interests, manifestly dictated to Con-

> gress the propriety of vesting in the District Court full and complete jurisdiction over all cases arising, or acts done, or matters involved, in the due administration and final settlement of the bankrupt's estate.

In re Christy, 44 U.S. (3 How.) 292, 391 (1845). The *in rem* nature of the bankruptcy system continues under the Bankruptcy Code, bolstered by enhanced *in personam* jurisdiction. *See Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 97 (1982) (White, J., dissenting). By operation of 28 U.S.C. § 1334(b), the District Court had jurisdiction over all actions "related to" Robins' Chapter 11 case.

At the time the Campbell Adversary Proceeding was filed, Piccinin was the plaintiff in a civil action against Robins and was attempting to continue that action against Aetna, Robins' co-defendant. Robins alleged and, upon the evidence presented, the District Court agreed that the Alabama Action threatened the administration of the Chapter 11 case pending in its court.[2] Thus, the impact of the Alabama Action on the Chapter 11 case gave the District Court jurisdiction to enter orders including the Preliminary Injunction, affecting that civil action. Any contrary result not only would violate the

---

[2] Piccinin asserts in her first question presented that the District Court made "no evidentiary findings in the bankruptcy proceeding that [her] action against Aetna threaten[ed] property of Robins' bankruptcy estate." Pet. No. 86-211, second page (unnumbered). To the contrary, the District Court heard evidence, including testimony from Robins' General Counsel, establishing the financial burden on Robins of continued defense of Dalkon Shield litigation. After hearing this evidence, the District Court specifically found that continuation of litigation against Robins' co-defendants, such as Aetna, (1) threatened property of Robins' estate, (2) burdened and impeded Robins' reorganization effort, and (3) contravened the public interest. App. at A119-21, A124-27, A134. The District Court also found that all remaining available proceeds of Robins' liability insurance coverage are property of Robins' Chapter 11 estate. *Id.* at A136.

letter and spirit of section 1334 but also would render impossible the administration of any bankruptcy case involving out-of-state creditors.

B. The Fourth Circuit's decision in *Piccinin* does not conflict with its prior decisions.

Piccinin argues that a writ of certiorari should issue to allow this Court to resolve a division of authority *within* the Fourth Circuit. No such division, however, exists. Piccinin wrongly contends that *Williford v. Armstrong World Industries, Inc.*, 715 F.2d 124 (4th Cir. 1983), bars the District Court from enjoining the continuation of civil actions against the debtor's co-defendants, such as Aetna. *Williford* involved an attempt by the non-debtor co-defendant to invoke the automatic stay for its benefit. *Id.* at 126. In the instant action, however, the debtor sought the injunction for its benefit. Robins sought to enjoin the Alabama Action to protect its Chapter 11 estate, not to protect Aetna. The District Court enjoined the Alabama Action because the evidence presented demonstrated that Robins' estate could be harmed by the possible creation of contribution or indemnity claims against Robins.[3] Moreover, the District Court specifically found that the continuation of the Piccinin action would divert the attention of key Robins personnel from the task of formulating a plan of reorganization. App. at 120-21. Nowhere did the District

---

[3] In support of her argument that continuation of the Alabama Action will not affect Robins' insurance or any other asset of its estate, Piccinin states that she has not filed a claim against Robins in the Chapter 11 case. Pet. No. 86-211 at 41. Although Piccinin may not have filed a claim, Aetna filed a $57 million claim for contribution against Robins based almost entirely on its potential liability in actions such as Piccinin's Alabama Action. Potential contribution and indemnity claims by co-defendants like Aetna, in addition to the immediate burden on Robins' employees and financial resources, were and remain the reasons necessitating the Preliminary Injunction. *See* n.2 *supra*.

Court cite any harm to Aetna as a basis for the Preliminary Injunction.

The alleged conflict between the District Court's ruling and *Williford* was squarely placed before the Fourth Circuit in the initial argument and was highlighted in the subsequent petition for rehearing.[4] In both instances, the Court of Appeals found no such conflict.

II. THE VENUE ORDER

A. The Venue Order was required by the Bankruptcy Code.

Petitioners cannot and do not question the District Court's authority to fix venue for all Dalkon Shield cases. Indeed, it was obligated to make this determination. Section 157(b)(5), states:

> The district court *shall* order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. § 157(b)(5) (emphasis added). Thus, although section 157(b)(5) gives the court a choice between two districts for trial venue, the determination of trial venue by the court in the bankruptcy case is mandatory.

B. The Venue Order was not a final determination.

The effort to seek review of the Fourth Circuit's decision with respect to the Venue Order is premature. The

---

[4] Piccinin also contends that the Fourth Circuit's decision conflicts with the unreviewed District Court's opinion in *In re A.J. Mackay Co.*, 50 B.R. 756 (D. Utah 1985). Pet. No. 86-211 at 42-45. *Mackay*, however, involved a stay of co-defendant litigation after plan confirmation. The court "[did] not hold that, in extraordinary cases, a non-bankrupt co-debtor cannot be protected prior to confirmation of a plan." 50 B.R. at 762. In fact, it recognized that such a stay may be necessary to protect the debtor. *Id.*

District Court's decision to determine trial venue for all pending Dalkon Shield actions against Robins was not a final determination but rather was

> conditional, dependent finally and ultimately upon a ruling to be made only after notice to all claimants advising them of their right to enter any objections they may have to such tentative ruling and to submit a motion for extension in their particular case.

App. at A101-02. The Venue Order, therefore, merely establishes the procedure for the mandatory determination of the trial venue for these cases, while reserving the court's power to abstain from hearing or to remand any particular proceeding. As the Fourth Circuit Court of Appeals' opinion made clear, rights of the Dalkon Shield claimants ("Claimants") are preserved.

> [D]ue process requires some form of notice and opportunity for a hearing before there can be a change of venue and before trial of a personal injury tort cause of action against a debtor may be transferred *finally* from the court in which the cause was initially filed to the district where the bankruptcy proceedings are pending.

App. at A96 (emphasis in original).[5]

The Claimants Committee asks this Court to exercise its power of review to "correct the grave errors below and to prevent their replication in other mass tort bankruptcies." Pet. No. 86-216 at 13. The Claimants Com-

---

[5] To avoid any misunderstanding on this point, the Fourth Circuit issued the following admonition:

> Until the conditional order is made final with regard to a particular case, the case should not be physically transferred. Thus, no filing fee shall be paid under Rule 9027 or expenditures accompanying photocopying, freight, etc. be made. Only after an order is final shall the expense of transfer be necessary.

App. at A102, fn. 18. Thus, the terms of the Fourth Circuit's opinion prohibit Robins from removing and physically transferring any case until the venue determination is final as to that case.

mittee thus implies that a grave error below has resulted in prejudice to a Claimant's right to a jury trial. As explained above, however, the Venue Order does not prejudice the right of any Claimant to petition for an alternative venue determination.

Because the Venue Order was not a final determination, it is not an appropriate matter for a writ of certiorari. Instead of reviewing a conditional order, this Court and the court of appeals should examine only final venue determinations in discreet cases in which objection to transfer is taken. Review at that time will be ordered by a factual record that permits a reasoned consideration of the factors affecting the District Court's election in that case.

C. *White Motor* is not inconsistent with the *Piccinin* Opinion.

The Claimants Committee argues that section 157(b)(5) was not intended to centralize cases, but was intended to decentralize claims. Pet. No. 86-216 at 7-8. In support of this argument, the Claimants Committee cites *In re White Motor Credit*, 761 F.2d 270 (6th Cir. 1985). Not only is this argument misplaced because no final decision has been made, this argument wrongly interprets Congress' intention in enacting section 157(b)(5). In addressing this point, the Fourth Circuit stated as follows:

> [The Claimants Committee and Piccinin] refer to the language of Senator Dole in commenting on the Senate Conference Report on the 1984 amendments and to construe it as suggesting that tort claims were to be tried in the court in which those claims were originally filed. Senator Dole, in the language to which appellants refer and out of which the appellants arrive at their finding of the sense of the Congress, actually restated simply the language of the statute itself. He said that 'where abstention does not occur, those cases [i.e., "personal injury

> cases"] will be handled by the district court where the bankruptcy has been filed or, if the court finds it appropriate, where the claim arose.' Statement of Hon. Robert Dole 130 Cong. Rec. S8889 (Daily Ed. June 29, 1984), *reprinted in*, 1984 U.S. Code Cong. & Ad. News 586, 587. *We discern nothing in that language to warrant the conclusion that, in enacting the statute the Congress favored decentralizing the administration of the bankruptcy by leaving all 'personal injury cases' to the court in the place where the claim 'arose.'* In fact, to accept the view of the Appellants on the construction of the statute would be completely at variance with the House version of the bill, which was in effect accepted by the Conference Committee, and would be to adopt the Senate version, which, according to Congressman Kastenmeier's statement as a House Conference member, was 'largely reject[ed]' by the Conference Committee and *'would have dissipated the assets of the estate by creating a multiplicity of forums for the adjudication of parts of a bankruptcy case.'*

App. at A74-75 (footnotes omitted) (emphasis added).

The Fourth Circuit also recognized that *White Motor* was not inconsistent with the result reached in *Piccinin.*

> The extent of the holding in *White Motor* was that the district court had the power under the statute to allow products liability cases to be tried where the claim arose; *there was nothing in the opinion, however, that declared that such action was mandated or even preferred.* Specifically, there was no statement in the opinion that the district court in which the bankruptcy was pending could not try the claim. Unquestionably the district court in this case has the power under the statute to fix the trial venue in its district for all the Dalkon Sheild cases.

Id. at A75-76 (emphasis added).

White Motor simply does not hold that a district court must abstain from hearing tort claims based upon state

law. Rather, the court in *White Motor* only affirmed the lower court's decision to abstain, allowing the tort cases to remain in the state courts. *White Motor*, 761 F.2d at 273. Moreover, the *White Motor* court itself observed that district courts should be given "wide latitude in referring [tort] cases through abstentions to other courts." Id. at 274. Accordingly, the same latitude must be given to a district court's decision not to abstain but to try the claims itself.

D. Section 157(b)(5) is not unconstitutionally vague.

Among Piccinin's challenges to the Fourth Circuit's decision is the contention that section 157(b)(5) is unconstitutionally vague. Much to the contrary, this provision is clear and unequivocal. As previously noted, the District Court must determine trial venue from two permissible choices. The available options are described with precision. The District Court must determine trial venue to be either the district in which the Chapter 11 case is pending—the identity of that district certainly is obvious—or the district in which the claim arose.[6]

The phrase "in which the claim arose" is not vague. Instead, it is a well recognized term of art in federal venue statutes supported by a wealth of judicial interpretation. *See* 28 U.S.C. § 1391; *see generally*, 15 A. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE, § 3806 (1976).

---

[6] Section 157(b)(5) clearly eliminates any chance of Piccinin's claim being tried in the Middle District of Alabama. Because Piccinin's entire experience with the Dalkon Shield occurred outside the United States, her claim could not possibly have arisen in Alabama. Section 157(b)(5) permits the District Court the choice of ordering that any trial of a claim related to the Chapter 11 case be held in Richmond (where it presently is pending) or to transfer the claim out of Richmond to the district in which it arose. As Piccinin's claim arose in no federal district, any trial of her claim must be in Richmond.

E. The District Court may utilize 11 U.S.C. § 105 to effectuate its 28 U.S.C. § 157(b)(5) obligations.

Piccinin argues that 11 U.S.C. § 105(a) cannot be employed to effectuate the trial venue determination pursuant to 28 U.S.C. § 157(b)(5). Pet. No. 86-211 at 37-39. Noting that section 105(a) permits the court to enter "any order . . . necessary or appropriate to carry out the provisions of *this* title," 11 U.S.C. § 105(a) (emphasis added), Piccinin suggests that it could not be invoked in this instance because section 157(b)(5) appears in Title 28. Section 105(c), however, states that "[t]he ability of any district judge . . . to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge . . . set forth in Title 28." Thus, the district court's obligation under 28 U.S.C. § 157(b)(5) is expressly incorporated into section 105.

Placing the district court's duty to determine trial venue in bankruptcy cases along with the other provisions generally relating to courts and judges simply reflects an organizational decision by Congress. *See* 1 L. KING, COLLIER ON BANKRUPTCY § 105.01, at 105-2 (15th ed. 1985). Section 105(c) was added by the 1984 amendments to clarify that section 105 applied equally to bankruptcy judges and district judges sitting in Title 11 cases. *Id.* Thus, section 105 does not limit the District Court's authority but enhances it.

Finally, Piccinin argues that section 105 cannot be invoked by the District Court because such transfers of venue are governed by 28 U.S.C. § 1412. Even if correct, this argument is insubstantial and does not justify issuance of a writ of certiorari. The argument, however, is not correct. Section 1412 governs the transfer of bankruptcy cases under Title 11; section 157(b)(5) governs the determination of venue for all personal injury claims,

including those such as Piccinin's that are related to a Chapter 11 case.

CONCLUSION

The Preliminary Injunction Order and the Venue Order do not present appropriate issues for this Court's review by writ of certiorari. The two orders are within the District Court's authority, were issued after applying the proper legal standards and were based upon findings supported by the evidentiary record. Furthermore, the Venue Order was not a final determination, in review by this Court would be premature. Therefore, this Court should deny Petitioners' petitions and refuse to issue a writ of certiorari.

Respectfully submitted,

WILLIAM R. COGAR
Counsel of Record
CLIFFORD W. PERRIN, JR.
JAMES S. CROCKETT, JR.
LINDA J. THOMASON
MAYS & VALENTINE
P. O. Box 2426
Richmond, Virginia 23208
(804) 644-6011

MICHAEL L. COOK
DENNIS J. DREBSKY
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for A. H. Robins Company, Incorporated